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"The Spirit of Justice" by Artist Terrance Guardipee

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SEATTLE UNIVERSITY SCHOOL OF LAW

Spirit of Justice

Terrance Guardipee and Catherine Black Horse donated this original work of art to the Center for Indian Law and Policy in November 2012 in appreciation for the work the Center engages in on behalf of Indian and Native peoples throughout the United States, including educating and training a new generation of lawyers to carry on the struggle for justice. The piece was created by Mr. Guardipee, who is from the Blackfeet Tribe in Montana and is known all over the country and internationally for his amazing ledger map collage paintings and other works of art. He was among the very first artists to revive the ledger art tradition and in the process has made it into his own map collage concept. These works of art incorporate traditional Blackfeet images into Mr. Guardipee's contemporary form of ledger art. He attended the Institute of American Indian Arts in Santa Fe. His work has won top awards at the Santa Fe Indian Market, the Heard Museum Indian Market, and the Autrey Museum Intertribal Market Place. He also has been a featured artist at the Smithsonian's National Museum of the American Indian in Washington, D.C., along with the Museum of Natural History in Hanover, Germany, and the Hood Museum at Dartmouth College.

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FISHABLE WATERS

Catherine A. O'Neill*

INTRODUCTION

Tribes have long recognized that degraded environments mean both depletion and contamination of the salmon and other fish,[1] including shellfish, on which they depend. As tribal leaders contemplated litigation against the states in the 1960s to defend their treaty-secured[2] right "to take fish," they sketched the problems for their attorneys in its multiple layers: tribal fishers were being assaulted and harassed on the waters; the state was discriminatorily "regulating" harvest; the once-abundant salmon runs had declined precipitously; the aquatic environments that support the salmon and other fish had become degraded to the point that

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[1] The term "fish," here and throughout, is understood to include all species of fish, including shellfish.

[2] Tribes' fishing rights have been recognized, from the U.S. perspective, through various means, including treaties, agreements, and executive orders. *See, e.g.*, United States v. Anderson, 6 Indian L. Rep. F-129 (E.D. Wash. 1979). This article recognizes the aboriginal origin of tribes' fishing rights, and does not mean to exclude any of the various forms of recognition for these rights by use of the terms "rights," "fishing rights," and "treaty-secured" rights, unless the context suggests otherwise. Nonetheless, the analysis in this article focuses on tribal rights reserved by means of the treaties between the tribes and the United States; a complete analysis of other sources of tribal fishing rights is beyond the scope of this article.

they were no longer a fit home.[3] As the tribes emphasized in the cases they brought before the courts, each of these affronts is a violation of the treaty promises.

With the decisions that emerged from that litigation – including the Boldt decision,[4] and then Rafeedie,[5] and most recently, the order and decision in the "culverts" case[6] – various facets of tribes' rights to take fish have been affirmed by United States courts.[7] Courts have held that, by means of the treaties, tribes reserved their pre-existing, aboriginal right to fish, and that the treaties secured this right in perpetuity. Thus, courts over the years have regularly interpreted the fishing right to encompass the subsidiary rights necessary to render it of continued relevance for tribal fishers. Among other things, courts have recognized that if the watersheds that are home to the fish are significantly degraded, the treaty right can be eviscerated as surely as if tribal members are hauled out of their boats or barricaded from the beaches.[8]

An understanding of the right to take fish reserved by the tribes is important in part because it continues to inform tribes' aspirations for and entitlements to a future in which their exercise of this right is robust, and tribal members' consumption and use of the resources on which they have historically depended is restored. The venues for tribes' efforts to stem depletion and contamination of the fish, to restore crucial habitats, and to ensure resilience in the face of a changing climate are many. Among

[3] *See, e.g.*, Al Ziontz, "Basics of *U.S. v. Washington*: The Early Days," Presentation at the University of Washington Annual Indian Law Symposium, Seattle, Washington (Sept. 6, 2007) (recounting experience as an attorney for the fishing tribes).
[4] United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) (commonly referred to as the "Boldt decision," for the opinion's author, Judge George Boldt).
[5] United States v. Washington, 873 F. Supp. 1422 (W.D. Wash. 1994) (commonly referred to as the "Rafeedie decision," for the opinion's author, Judge Edward Rafeedie).
[6] Order on Cross-Motions for Summary Judgment, United States v. Washington, 2007 WL 2437166 (W.D. Wash.) [hereinafter Culverts Order]; Memorandum and Decision, United States v. Washington, No. 9213RSM, Subproceeding 01-1, slip op. (W.D. Wash. 2013) [hereinafter Culverts Decision]. On March 29, 2013, Judge Martinez issued a decision denying the State of Washington's request for reconsideration of the court's 2007 Culverts Order; incorporating its earlier rulings, including the Culverts Order; and granting the tribes' request for a permanent injunction.
[7] *See also*, Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969).
[8] The contours and nuances of the courts' holdings in this line of cases are elaborated more thoroughly below, in Part II.

other things, tribes have worked to address water quality,[9] seeking to clean up and prevent toxicants that are harmful to the fish and to all who depend on the fish for food. Thus, tribes have set their own water quality standards to protect the waters over which they exercise regulatory authority. And tribes have urged their federal and state counterparts – whose environmental standards impact much of the waters that support the treaty resource – to set more protective water quality standards. Tribes' early appeals to federal and state agencies were met by claims that these agencies were powerless to issue more protective standards for dioxins and other toxicants.[10] That is, because the standards were premised on quantitative assessments of human exposure and because these agencies didn't have any quantitative data about tribal members' fish intake, they claimed they couldn't account for the greater risks faced by tribal members who consumed – and were legally entitled to consume – large amounts of fish. Instead, these agencies maintained, they must assume that tribal members, like everyone else, ate just twelve fish meals a year.

So the tribes conducted studies to quantify what they knew to be true about their consumption practices. The Columbia River Inter-Tribal Fish Commission (CRITFC) published a survey of contemporary fish consumption practices in its four member tribes in 1994.[11] The Squaxin Island and Tulalip tribes published a survey of their members' contemporary consumption practices in 1996;[12] and the Suquamish tribe published its survey in 2000.[13] More recent research has been conducted

[9] The terms "water quality" or "waters," here and throughout, are understood to refer to all components of our waters, including surface waters and sediments.
[10] *See* Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L. J. 3, 37, 46-51 (2000) [hereinafter O'Neill, *Variable Justice*] (recounting this history).
[11] COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION, A FISH CONSUMPTION SURVEY OF THE UMATILLA, NEZ PERCE, YAKAMA, AND WARM SPRINGS TRIBES OF THE COLUMBIA RIVER BASIN (1994) [hereinafter CRITFC, FISH CONSUMPTION SURVEY].
[12] TOY, ET AL, A FISH CONSUMPTION SURVEY OF THE TULALIP AND SQUAXIN ISLAND TRIBES OF THE PUGET SOUND REGION (1996) [hereinafter TULALIP AND SQUAXIN ISLAND FISH CONSUMPTION SURVEY].
[13] SUQUAMISH TRIBE, FISH CONSUMPTION SURVEY OF THE SUQUAMISH TRIBE OF THE PORT MADISON INDIAN RESERVATIONS, PUGET SOUND REGION (2000) [hereinafter SUQUAMISH TRIBE, FISH CONSUMPTION SURVEY].

by the Swinomish,[14] Lummi,[15] and Colville[16] tribes. In every case, these studies of contemporary tribal practices documented that tribal members consumed fish at markedly greater rates than the twelve meals a year – 6.5 grams per day (g/day) – then assumed by the federal Environmental Protection Agency (EPA)[17] and still assumed by Washington, Idaho, and Alaska.[18] In fact, although these surveys recorded consumption rates for tribal people that reflect contemporary, "suppressed," practices – practices that are artificially diminished relative to historical or "heritage" practices – the rates they document can be more than *two hundred times* the 6.5 g/day figure.

Agencies have had the quantitative data they sought for nearly two decades now – since the CRITFC study was published in 1994. A generation of Indian people has been born and come of age during this time. They have grown up seeing signs along the waterways warning against consuming fish, encountering notices at tribal fisheries departments of toxic shellfish, and clicking on websites containing

[14] *See* Jamie Donatuto & Barbara L. Harper, *Issues in Evaluating Fish Consumption Rates for Native American Tribes*, 28 RISK ANALYSIS 1497, 1500 (2008) (discussing methodology and preliminary findings of Swinomish survey of contemporary tribal fish consumption).

[15] LUMMI NATURAL RESOURCES DEPARTMENT, LUMMI NATION SEAFOOD CONSUMPTION STUDY (2012) [hereinafter LUMMI NATION SEAFOOD CONSUMPTION STUDY].

[16] *See* Confederated Tribes of the Colville Reservation, Office of Environmental Trust, Comments on Ecology's Fish Consumption Rate Technical Support Document (Jan. 17, 2012) *available at* http://www.ecy.wa.gov/programs/tcp/regs/2011-SMS/120120-fish-comments/Colville.pdf (last visited Apr. 20, 2013) (discussing preliminary findings of Colville survey of contemporary tribal consumption and resource use).

[17] U.S. Environmental Protection Agency, Guidelines and Methodology Used in the Preparation of Health Effect Assessment Chapters of the Consent Decree Water Criteria Documents, 45 Fed. Reg. 79,347, App. C (1980).

[18] *See, e.g.,* Water Quality Standards for Surface Waters for the State of Washington, WASH. ADMIN. CODE § 173-201A-240(5) (2011) (adopting "National Toxics Rule" for Washington's human health-based criteria for surface water quality); U.S. Environmental Protection Agency, Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance; Final Rule, 57 Fed. Reg. 60,848 (Dec. 22, 1992) [hereinafter EPA, National Toxics Rule] (enlisting 6.5 g/day fish consumption rate). Note that Washington's cleanup rule, the Model Toxics Control Act (MTCA), currently uses a default fish consumption rate of 54 g/day, halved by a default diet fraction of 0.5, so that the effective default fish consumption rate for cleanup is 27 g/day. Model Toxics Control Act Cleanup Regulation, WASH. ADMIN. CODE § 173-340-730(3) (2012). MTCA also permits site-specific departures from these defaults. Id. at § 173-340-730(3)(c) and (d).

instructions for trimming the fat and discarding the skin so as to avoid the lipophilic toxics harbored there. Yet the state of Oregon only just promulgated water quality standards that reflect a more protective fish consumption rate (FCR) of 175 g/day. Washington, Idaho and Alaska continue to drag their feet. And the EPA lets them. The result is that the old 6.5 g/day number is effectively re-selected by these agencies each day. This paltry amount functions and will continue to function as the *de facto* ceiling on safe consumption as long as it remains in force. Tribal people who consume more fish than this are left to do so at their peril. Yet consumption of contaminated fish is the primary route of human exposure to mercury, PCBs, dioxins, and a host of other toxic substances that cause cancer or other harms.

Federal and state environmental agencies are bound by the treaty promises. They, too, are successors to the treaties. These agencies, additionally, are keepers of the Clean Water Act (CWA), a law that supports a goal of "fishable waters" from Atlantic to Pacific. But, in the Pacific Northwest, state and federal efforts to address toxic contamination have fallen woefully short of the CWA's aspiration and have undermined tribes' treaty-secured rights to take fish that are fit for humans to consume.

This article considers recent experience in the Pacific Northwest with states' water quality standard setting efforts. Given that these standards determine the future health of the waters that support the fish to which tribes have treaty-secured and other rights, this article argues, state and federal agencies' efforts ought to proceed differently. The tribal context – the fact of tribes' unique political and legal status, the presence of tribes' treaty-secured and other rights to take fish, and the implications of these rights – that permeates environmental decisions here in the Pacific Northwest means that the process and the decisions ought to be different than they would be in a different context.[19]

[19] The "different context" suggested here is used in the sense of a place where the tribal context does not obtain. As such, on this continent, it may be purely hypothetical. The point, then, is not to suggest that considerations similar to those present in Washington and the Pacific Northwest won't exist in other places as well; rather, it is to emphasize that tribes' legal status and rights present particular and sometimes unique considerations that must be appreciated.

Thus, this article maintains, agencies' quest for "fishable waters" is one that must be framed by the treaties and other sources of tribal fishing rights. The treaty-secured rights to the fish are the proper touchstone for and measure of agencies' efforts to restore the nation's waters. So while the title of this article borrows a shorthand interpreting Congress' instruction in the CWA,[20] this is not to suggest that the United States can be relieved of its obligations under the treaties by implicitly redefining them according to some narrower conception. To be clear: it is tribes' rights to take fish – adequate in quantity and quality – that define what we, as successors to the treaties, must mean by "fishable waters."

This article comprises seven parts. Part I describes the fish and the fishing peoples indigenous to the Pacific Northwest. The fish were and remain vital to tribal people throughout this region – so much so that the tribes reserved their fishing rights when they negotiated treaties and other agreements with the United States government. These rights and U.S. courts' interpretations of these rights are discussed in Part II. Part III documents the depletion and contamination that have increasingly threatened the salmon and other fish resources since the time of the treaties and observes that the fish have been permitted to become polluted to a degree that they pose a risk to humans and other piscavorous species. Part IV considers tribal fish consumption practices historically, in the present, and in the future. Part V explains the CWA's aspiration for "fishable waters" and how the water quality standards provisions work to effectuate this goal. This Part also explains how a fish consumption rate and other assumptions about people's exposure factor into agencies' risk-based standards. Part VI recounts experience to date with agencies' efforts to update the water quality standards that govern much of the waters in the Pacific Northwest, focusing in particular on recent experience in Washington. Part VII then offers a critique, founded in tribes' treaty-secured right to take fish. This Part argues that tribes' rights have implications for the various arguments and tactics encountered by agencies in Washington and elsewhere in the Pacific Northwest. Among other things, they mean that many arguments that may be plausible as a more general matter, i.e., were the fishing tribes' rights and

[20] *See* discussion *infra* notes 158-59 and accompanying text.

interests not at stake, become untenable here. This article closes by reiterating that we are all successors to the treaties and therefore urges the states and EPA to work together with their tribal partners to chart a path that honors the tribes' treaty-secured rights.

I. THE FISH AND THE FISHING PEOPLES OF THE PACIFIC NORTHWEST

Salmon's range defines the boundaries of the Pacific Northwest.[21] But salmon do not merely delineate the region's boundaries in our minds or on a map. Salmon, functionally, *are* the ecosystems of the Pacific Northwest. They are supported by and themselves support the watersheds that comprise this region, draining a vast area of inland creeks, streams, and lakes and emptying into rivers or bays and, ultimately, into the Pacific Ocean.

The life histories of Pacific salmon vary among and within species but all are anadromous.[22] Adult salmon lay their eggs in freshwater streams and lakes, where their offspring hatch and rear before migrating out to the ocean to forage until they reach maturity. At maturity, adults return to their natal stream or lake to spawn and die, completing the cycle.[23]

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[21] *See, e.g.,* National Oceanic & Atmospheric Administration, National Marine Fisheries Service, Northwest Regional Office, "ESA Salmon Listings," archived website from Jan. 16, 2013 *available at* http://web.archive.org/web/20130116053131/http://www.nwr.noaa.gov/ESA-Salmon-Listings/Index.cfm (last visited Apr. 23, 2013) ("Pacific salmon are the Northwest's biological and cultural icon."); *see also*, THOMAS P. QUINN, THE BEHAVIOR AND ECOLOGY OF PACIFIC SALMON & TROUT 10-12 (2005) (stating that the native range of Pacific salmon actually extends beyond what would be termed the "Pacific Northwest," once reaching, for example, as far south as northern Mexico on the east coast of the Pacific Ocean).

[22] QUINN, *supra* note 21, at 5-6. ("All salmonids spawn in freshwater and some spend their entire lives there. However, many migrate to sea to grow to their final size and then return to freshwater to spawn. This life-history pattern [is] known as *anadromy*"). While all Pacific salmon species are anadromous, some species (e.g., sockeye) have nonanadromous populations and there may be nonanadromous individuals within some populations (e.g., Chinook). *Id.* at 5. *See also, id.,* at 209-213 (discussing kokanee, a nonadanromous form of sockeye); and discussion of residency in some Puget Sound Chinook, *infra* notes 266-68 and accompanying text.

[23] Quinn describes the "three key themes" in the biology of salmonids as anadromy, homing (salmonids "almost invariably return to the site where they were spawned" to spawn as adults), and semelparity ("death inevitably follows reproduction"), and notes

Young salmon may spend anywhere from a few days to two or more years in fresh water before moving to estuarine environments and then entering salt water, i.e., marine environments, although some remain in freshwater their entire lives.[24] Similarly, adult salmon may spend anywhere from one to seven years in saltwater environments, with variation among and between species.[25] Chinook salmon originating in the rivers of the Puget Sound watershed, for example, typically migrate out to the Pacific and forage along the coastal continental shelf.[26] However, a significant portion of these salmon display "resident" behavior, remaining in the Puget Sound during the marine phase of their lives.[27] Salmon migration, both outward and homeward, is impressive in its distance and intricate in its patterns.[28] Salmon, for example, don't leave their various natal tributaries and make a beeline through the Puget Sound and out to the Pacific Ocean. Rather, research "clearly reveals that salmon use the Puget Sound basin widely, and migrate back and forth within it, heavily."[29] In fact, "[m]any authors reported finding extensive juvenile salmon use along the estuarine and nearshore landscape, as well as strong evidence from coded-wire tag data of cross-sound migration.

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that "[e]ach theme is broadly distributed among salmonids but each has interesting and important exceptions." *Id*. at 4-7.

[24] *See generally id*.

[25] *See generally id.*

[26] *Id.* at 42 (describing the migration pattern shown by Chinook and coho salmon, stating: "Many populations of these species remain largely or entirely in coastal waters. In most cases they are generally distributed to the north of their river of origin, but some populations remain relatively close to their natal river and some migrate southward.").

[27] Sandra M. O'Neill & James E. West, *Marine Distribution, Life History Traits, and the Accumulation of Polychlorinated Biphenyls in Chinook Salmon from Puget Sound, Washington*, 138 TRANSACTIONS OF THE AMERICAN FISHERIES SOCIETY 616, 626-28 (2009) (while precise estimates are not possible, existing information supports the general conclusion that "a considerable proportion of Puget Sound-origin Chinook salmon display resident behavior").

[28] *See, e.g.,* QUINN, *supra* note 21, at 42 ("Chinook and coho salmon seem to move more slowly homeward than pink, sockeye, and chum salmon. They do not necessarily swim more slowly but they probably swim in a less directed manner and feed more extensively while migrating."); *id*. at 57 ("For reasons that are not clear, the populations [of Fraser River sockeye] that spawn later do not remain on the open ocean, but rather return to coastal waters and move back and forth in the Strait of Georgia for about a month before migrating upriver").

[29] PACIFIC ESTUARY RESEARCH SOCIETY, SALMON IN THE NEARSHORE: WHAT DO WE KNOW AND WHERE DO WE GO? 2 (2004), *available at* http://www.pers-erf.org/SalmonNearshoreFinal.pdf (last visited Apr. 20, 2013).

Fish from north Puget Sound areas are found in central and south Puget Sound studies, and vice versa."[30] The transition between freshwater and saltwater environments, whether during outward or homeward migration, is marked by extraordinary morphological and other changes in all species of salmon. Among these biological changes is the cessation of feeding during homeward migration. The exact point at which salmon stop feeding can vary considerably among populations.[31] Although returning salmon have generally been thought to cease feeding once they enter fresh water, both observation and recent study suggest that salmon may continue to feed in fresh water.[32]

Each stage of the salmon lifecycle has particular habitat requirements. Eggs must incubate in redds (nests) constructed from substrates of a certain composition; juvenile salmonids require waters that are relatively cool and clean; outmigrants depend on particular flow regimes – in short, salmon depend on the particular chemical, physical, and biotic attributes of the freshwater, estuarine, and saltwater environments that are their home at each life stage.

And the salmon contribute to the environments of which they are a part. Thus, for example, the trees that provide the streamside shade necessary to cool the waters for the temperature-sensitive eggs, and that provide the large woody debris in the streams and so the eddies, pools, and channels important to juvenile foraging and other behaviors are in turn

[30] *Id.* at 1; *accord* NORTHWEST INDIAN FISH COMMISSION, STATE OF OUR WATERSHEDS REPORT 244 (2012) [hereinafter NWIFC, 2012 SOW] (summarizing findings from the Squaxin Island tribe at the southernmost end of the Puget Sound that "[a] tremendous amount of marine shoreline and diversity of habitats support rearing and migrating salmonids in the region. Smolts from elsewhere in the Puget Sound, like the Puyallup River [to the north], frequently visit the South Sound before heading to the open ocean.").
[31] QUINN, *supra* note 21, at 56.
[32] Shawn R. Garner et al., *The Importance of Freshwater Feeding in Mature Pacific Salmon: a Reply to the Comment by Armstrong on "Egg Consumption in Mature Pacific Salmon (Onchorhynchus ssp.)"* 67 CANADIAN JOURNAL OF FISHERIES & AQUATIC SCIENCES 2055 (2010) ("Where once it was acceptable to dismiss freshwater feeding by mature Pacific salmon out of hand, there is surprisingly little data to support this belief. Our study instead shows that Pacific salmon do feed in fresh water and that the energetic and physiological benefits may be substantial."); *but cf.* Jonathan B. Armstrong, *Comment on "Egg Consumption in Mature Pacific Salmon (Onchorhynchus ssp.)"* 67 CANADIAN JOURNAL OF FISHERIES & AQUATIC SCIENCES 2052 (2010).

nourished by the phosphorous and nitrogen supplied by decomposing salmon that have returned to spawn. Indeed, "the entire ecosystem – from insects to bears and trees, including the salmon themselves – benefits in complex direct and indirect ways from decomposing salmon."[33]

The fishing peoples have always been a part of this cycle. The fish feed the people; the people take care of the fish. Moreover, as tribal people have explained, Indian people are bound to serve in this role, having covenanted with the salmon to do so, then, now and in the future.[34] This relationship is at the heart of tribal identity and guides tribal life. The Swinomish tribe, for example, explains: "We are the People of the Salmon and our way of life is sustained by our connection to the water and to the lands where we have fished, gathered and hunted since time immemorial."[35]

The salmon were and remain vital to tribal well-being, and central to the identity of the tribes. But other fish and shellfish, too, were and are important to Indian people.[36] As *Tsi'li'xw* Bill James, Lummi Nation Hereditary Chief, explains, "seafood is the lifeline of our people. Everything under the water, our people ate during different times of the year."[37] *Tsi'li'xw* Bill James tells of *Soxwe* (butter clams) and *Swam* (horse clams) and "all of the different clams," as well as "mussels, oysters, cockles, and crabs."[38] He tells of the herring spawn in what is now Bellingham and "how the herring spawn used to be right where the harbor is" and of the eel grass and the places where they used to catch halibut.[39] Today, too, a vast array of species is vital to tribal people. For example:

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[33] *See, e.g.,* QUINN, *supra* note 21, at 129; *see generally, id.* at 129-42 (chapter 7, "The Ecology of Dead Salmon").
[34] *See, e.g.,* David Close, Northwest Indian Fisheries Commission News Release (Apr. 27, 2010) (speaking at the Coast Salish Gathering, David Close (Cayuse) explains "we made a promise – the food would take care of us and we would take care of the food").
[35] Swinomish Indian Tribal Community, "We are …," *available at* http://www.swinomish-nsn.gov/ (last visited Apr. 20, 2013).
[36] The importance of fish, to individual tribal members and to the tribe as a whole, as a source of food and livelihood but also as a center around which tribes' social, cultural, and spiritual lifeways revolve, is also discussed in Part IV, *infra*.
[37] LUMMI NATION SEAFOOD CONSUMPTION STUDY, *supra* note 15, at i (2012).
[38] *Id.* at ii.
[39] *Id.* at iii.

> "Seafood consumed by Lummi tribal members is mostly harvested by Lummi tribal members and distributed among families. Seafood is very rarely purchased from a store by Lummi tribal members and the cycle of commercial, ceremonial, and subsistence fisheries openings for Chinook salmon, coho salmon, sockeye salmon, pink salmon, halibut, crab, clams and oysters, geoducks, sea urchins, sea cucumbers, and other species determine the rhythm of life in the community."[40]

For the other tribes in the Pacific Northwest, too, fish and shellfish of every sort are important, among other things as sources of food and income.[41] Tribal members continue to invoke a saying that references this importance: "when the tide is out, the table is set."[42]

The tribes have always relied on these foods, harvesting them in their seasons, managing the resources and the ecosystems that supported them. Although there were differences among the various groups within the region, patterns of use and settlement generally comprised a seasonal round.[43] Pacific Northwest peoples engaged in

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[40] *Id*. at 10.
[41] *See, e.g.,* Port Gamble S'Klallam Tribe, "Finfish," *available at* http://www.pgst.nsn.us/natural-resources/finfish (last visited Apr. 20, 2013) (stating that "[t]he S'Klallam territory comprised most of the northern Olympic Peninsula, with access to a large number of rivers as well as the open waters of the Strait of Juan de Fuca. They also made seasonal migrations north to the San Juan Island area, where they set up temporary fishing camps, and south to Hood Canal where they shared fishing sites with the Skokomish. The waters within these areas produced countless numbers and varieties of fish, most of which the S'Klallam utilized. The most important of these was the salmon since it constituted the principal food of the S'Klallam. Common among the other varieties of fish they caught were halibut, herring, lingcod, smelt, dogfish (a species of shark), and candlefish.); Port Gamble S'Klallam Tribe, "Shellfish," *available at* http://www.pgst.nsn.us/natural-resources/shellfish (last visited Apr. 20, 2013) (stating that "[t]he Port Gamble S'Klallam Tribe has depended upon shellfish as a source of food and for trade or income for thousands of years. Clams, crab, oysters, shrimp and many other species were readily available for harvest year around" and that the tribe "still relies heavily" on these species).
[42] *See, e.g.,* Port Gamble S'Klallam Tribe, "Shellfish," *available at* http://www.pgst.nsn.us/natural-resources/shellfish (last visited Apr. 20, 2013).
[43] Douglas Deur & Nancy J. Turner, *Introduction: Reassessing Indigenous Resource Management, Reassessing the History of an Idea* in KEEPING IT LIVING: TRADITIONS OF PLANT USE AND CULTIVATION ON THE NORTHWEST COAST OF NORTH AMERICA at 3, 10-12

agriculture and mariculture; they managed vast salmon fisheries.[44] As Ronald Trosper has documented, Native peoples of the Pacific Northwest Coast sustainably managed the resources of their ancestral homelands, including the Pacific salmon runs, for at least two millennia prior to contact, despite having sufficient technology and population pressure to have extirpated the salmon resource.[45] As the Coast Salish Gathering explains: "We, the Coast Salish, bring thousands of years of knowledge of management and conservation of the Salish Sea and her tributaries, a knowledge base that began before contact and continues into the present."[46]

(Douglas Deur & Nancy J. Turner, eds., 2005); Swinomish Indian Tribal Community, *13 Moons: The 13 Lunar Phases, and How They Guide the Swinomish People* (2006).

[44] *See generally,* Deur & Turner, *supra* note 43; ROBYN HEASLIP, ACCESS PROTOCOLS AND SOCIAL IDENTITY IN KWAKWAKA'WAKW CLAM MANAGEMENT: FROM COLONIALISM TO CULTURAL REVITALIZATION (Masters Thesis, Simon Frasier University, 2008); Nigel Haggan, et al., *12,000+ Years of Change: Linking Traditional and Modern Ecosystem Science in the Pacific Northwest*, UNIVERSITY OF BRITISH COLUMBIA FISHERIES CENTER, WORKING PAPER 2006-02 (2006). For example, Native peoples employed their considerable skill as hydrological engineers to enhance spawning and rearing habitat, such as by felling trees, by constructing logjams, and by depositing fill material to create back eddies for fish to rest, or to direct the flow of fresh water in order to flush silt and oxygenate spawning gravel. The tribes also enforced prohibitions on polluting the lakes and rivers that were home to the salmon, and undertook habitat restoration. *Id.* at 7, 12. The tribes employed selective harvest practices, which enabled conservation (i.e., escapement of the requisite number of returning spawners to ensure propagation), close observation, and "purposeful husbandry of their salmon stocks." D. Bruce Johnsen, *Salmon, Science, and Reciprocity on the Northwest Coast*, 14 ECOLOGY AND SOCIETY 43 (2009).

[45] *See, e.g.*, RONALD L. TROSPER, RESILIENCE, RECIPROCITY AND ECOLOGICAL ECONOMICS: NORTHWEST COAST SUSTAINABILITY (2009). Professor Trosper undertakes a three-part proof to "establish that the Pacific Northwest peoples are an example of resilience and sustainability" with respect to the salmon fisheries. He demonstrates, first, that these peoples' ways of life did in fact persist for a long time; second, that they had the technology to fish too intensively; and third, that population levels were high in relation to the resource. He concludes that these three conditions were present, such that the peoples of the Pacific Northwest could have lived in an unsustainable relationship with the environment, depleting the fishery resource, but they did not. *Id.* at 6-11. *Accord* Haggan, et al., *supra* note 44 (emphasizing the fact of human habitation and management of their resources on the Pacific Northwest coast for thousands of years); JOSEPH E. TAYLOR, III, MAKING SALMON: AN ENVIRONMENTAL HISTORY OF THE NORTHWEST FISHERIES CRISIS 18 (1999) (concluding, with regard to the Native peoples of the Columbia River Basin, that "[a]boriginal fishing methods *could* fully exploit the region's salmon runs") (emphasis in original).

[46] Coast Salish Gathering, *Coast Salish Gathering Treatise* 3 (2010) (quoting Leah George-Wilson, past Chief of Tsleil-waututh Nation, "We carry 10,000 years of knowing

So vital were these resources, these "first foods," that, while the tribes ceded vast expanses of their homelands through treaties with the United States, they nonetheless took pains to reserve their right to fish – that is, to continue to be fishing peoples, to take care of and be cared for by the fish as they always had.

II. TRIBES' UNIQUE POLITICAL AND LEGAL STATUS AND RIGHTS TO FISH

Tribes comprise distinct *peoples* with inherent rights. Tribes' status as self-governing, sovereign entities pre-dated contact with European settlers. This status, nonetheless, was affirmed by the nascent United States. Among other things, the U.S. viewed the Indian tribes as sovereigns, capable of entering into treaties.[47] Today, tribes are recognized to have a unique political and legal status – a status that sets them apart from every other "subpopulation" or group that might warrant particular consideration in decisions about environmental standards.[48] Tribes' rights and interests, moreover, are protected by a constellation of laws and commitments that are unique among groups affected by federal, state, and other decisions. These include protections secured by treaties, laws, and executive orders that speak to the rights of tribes and their members.

A. Tribal Fishing Rights

The starting place for an analysis of tribal fishing rights is a recognition that, prior to European contact, fishing, hunting, and gathering were vital to the lives of Indian people. Indians' aboriginal title to this land included the right to engage in these practices.[49] When tribes entered into treaties and agreements ceding lands to the United States, they often

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the Salish Sea …"). The Salish Sea name recognizes the Juan de Fuca Strait, the Strait of Georgia, and Puget Sound as a single marine ecosystem. *Id.* at 1.

[47] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[48] *See, e.g.,* United States v. Mazurie, 419 U.S. 544, 557 (1977) (rejecting lower court's characterization of tribe as mere association of U.S. citizens and finding, instead, that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory …"); *see also* Williams v. Lee, 358 U.S. 217 (1959); Morton v. Mancari 417 U.S. 535 (1974).

[49] FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 1154-56 (2012 ed.).

nonetheless reserved a suite of important rights, including their aboriginal fishing rights.

1. The "Right to Take Fish"

The Treaty of Point Elliott provides that "[t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory...."[50] Although the precise language of the fishing clause varies somewhat in the different treaties with the tribes of the Pacific Northwest, U.S. courts have interpreted these provisions similarly to secure to the tribes a permanent, enforceable right to take fish throughout their fishing areas for ceremonial, subsistence and commercial purposes.[51] For its part, upon entering into treaties and agreements with the various tribes, the U.S. bound itself and its successors to protect the tribes' right to take fish in perpetuity. The treaties, moreover, have the status under the Constitution of "supreme law of the land."[52]

Importantly, all of the rights not expressly relinquished by the tribes were retained. This is a crucial tenet of federal Indian law.[53] As affirmed by the U.S. Supreme Court, the treaties represent "not a grant of rights to the Indians, but a grant of rights *from* them – a reservation of those not granted." [54] Treaty-reserved fishing rights are akin to pre-existing servitudes that burden and "run with" off-reservation lands.[55] The Court has held, for example, that implicit within the treaties' specific reservation

[50] Treaty with the Duwamish, Jan. 22, 1855, U.S.-Duwamish, art. V, 12 Stat. 927 (1859).
[51] *See, e.g.,* Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D. Or. 1977) (finding that a proposed dam on Catherine Creek would infringe rights guaranteed to the Umatilla tribe by the Treaty with the Walla Walla and stating "[f]urther, while the 1855 treaty spoke only of 'stations,', it is clear that the government and the Indians intended that all Northwest tribes should reserve the same fishing rights. 'It is designed to make the same provision for all the tribes and for each Indian of every tribe. The people of one tribe are as much the people of the Great Father as the people of another tribe; the red men are as much his children as the white men.'" (quoting Governor Stevens)).
[52] *Worcester*, 31 U.S. (6 Pet.) at 519 (1832) ("The constitution [declares] treaties already made, as well as those to be made, the supreme law of the land . . .").
[53] COHEN, *supra* note 49, at 1156-57.
[54] United States v. Winans, 198 U.S. 371, 381 (1905) (emphasis added).
[55] *Id.* (stating "[t]hey imposed a servitude upon every piece of land as though described therein").

of the right to "take fish" are rights of access, including over state or privately owned land.[56] "This principle ensures that reserved treaty rights are not rendered a nullity by shifting patterns of property ownership and development."[57]

Additionally, under federal Indian law, unique canons guide courts' construction of the treaty language.[58] According to the canons, treaties should be construed liberally in favor of Indian tribes; they should be construed as the Indians would have understood them; and any ambiguities should be resolved in the tribes' favor.[59]

The historical record, from both sides, is very clear on the point that protections for the Pacific Northwest tribes' pre-existing fishing rights were crucial to obtaining tribes' assent to the treaties. U.S. courts have recognized this understanding on the part of the treaty negotiators:

> It is perfectly clear … that the Indians were vitally interested in protecting their right to take fish at usual and accustomed places, whether on or off the reservations, and that they were invited by the white negotiators to rely and did in fact rely heavily on the good faith of the United States to protect that right.[60]

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[56] *Id.* (observing that "[n]o other conclusion would give effect to the treaty").
[57] COHEN, *supra* note 49, at 1174; *accord* Grand Traverse Bay of Ottawa & Chippewa Indians v. Dir., Michigan Dept. of Natural Resources, 141 F.3d 635, 641 (6th Cir. 1998) (finding that tribe's reserved fishing rights in Lake Michigan entitled the tribe to mooring access at two municipally owned marinas, given the necessity of using large boats for safety reasons and the fact that the marinas occupied the only harbors within reasonable distance of the reserved fishing locations).
[58] COHEN, *supra* note 49, at 113-19, 1156. ("The canons have quasi-constitutional status; they provide an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional derogation."); *id.* at 118-19.
[59] *See, e.g.,* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 194, 196, 200 (1999).
[60] Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 667 (1979) (holding that the treaty fishing clause guarantees to the tribes not merely access to usual and accustomed fishing sites and an "equal opportunity" for Indians, along with non-Indians, to try to catch fish, but instead secures to the tribes a right to harvest a share of each run of anadromous fish that passes through tribal fishing areas).

Accordingly, for more than a century, the courts have regularly interpreted the fishing right to encompass not only the right to harvest but also the subsidiary rights necessary to render it of continued relevance for tribal fishers. Among the facets of the treaty guarantees affirmed by the courts are the points that: (1) "The treaty clauses regarding off-reservation fishing . . . secured to the Indians rights, privileges and immunities distinct from those of other citizens."[61] (2) The rights secured to tribes by treaty are permanent, such that "[t]he passage of time and the changed conditions affecting the water courses and the fishery resources in the case area have not eroded and cannot erode the right secured by the treaties . . ."[62] (3) "[N]either the treaty Indians nor the state . . . may permit the subject matter of these treaties [i.e. the fisheries] to be destroyed."[63] (4) The treaty fishing rights encompass the right to fish in all areas traditionally available to the tribes, and "[agencies] ... do not have the ability to qualify or limit the Tribes' geographical treaty fishing right (or to allow this to occur ...) by eliminating a portion of an Indian fishing ground …," except as necessary to conserve a species.[64] (5) The treaty fishing rights encompass all available species of fish found in the treating tribes' fishing areas, "[b]ecause the 'right of taking fish' must be read as a reservation of the Indians' pre-existing rights, and because the right to take *any* species, without limit, pre-existed the Stevens Treaties."[65] These features of tribes' rights are important in part because they continue to inform tribes' aspirations for and entitlements to a future in which their exercise of their rights is robust, and tribal members' consumption and use of the resources on which they have historically depended is restored.

[61] United States v. Washington, 384 F. Supp. 312, 401 (W.D. Wash. 1974).
[62] *Id.*
[63] United States v. Washington, 520 F.2d 676, 685 (9th Cir. 1975).
[64] *See, e.g.,* Muckleshoot v. Hall, 698 F. Supp. 1504, 1513-14 (W.D. Wash. 1988) (enjoining construction of a marina in Elliott Bay that would have eliminated a portion of the tribes' usual and accustomed fishing areas); *see also* United States v. Oregon, 718 F.2d 299, 305 (9th Cir. 1983) (holding that "the court must accord primacy to the geographical aspect of the treaty rights").
[65] United States v. Washington, 873 F. Supp. 1422, 1430 (W.D. Wash. 1994) (emphasis in original).

2. The "Culverts" Case

The U.S. courts' most recent affirmation of the treaty guarantees is of a piece with these previous cases. In what is known colloquially as the "culverts" case,[66] the court addressed a threat to the tribes' treaty rights posed by environmental degradation. The culverts case is an outgrowth of *United States v. Washington*, in which Judge Boldt divided the questions before the court into two "phases." In Phase II, the district court considered "whether the right of taking fish incorporates the right to have treaty fish protected from environmental degradation."[67] The court in 1980 held that "implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation….The most fundamental prerequisite to exercising the right to fish is the existence of fish to be taken."[68] On appeal, the district court's opinion was vacated on jurisprudential grounds.[69] The Ninth Circuit found its "general admonition" inappropriate as a matter of "judicial discretion" and stated that the duties under the treaties in this respect "will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case."[70] So, in the culverts case, filed in 2001, the tribes brought to the court's attention such a set of concrete facts. Specifically, the tribes cited evidence that the state of Washington had improperly maintained culverts around the state, with the result that miles of salmon habitat were blocked, contributing to a decline in salmon

[66] Culverts Order, 2007 WL 2437166 (W.D. Wash.); Culverts Decision, No. 9213RSM, Subproceeding 01-1, slip op. (W.D. Wash. 2013).
[67] United States v. Washington, 506 F. Supp. 187, 190 (W.D. Wash. 1980) (Phase II) *vacated by* United States v. Washington, 759 F.2d 1353 (9th Cir. 1985).
[68] United States v. Washington, 506 F. Supp. at 203.
[69] The procedural history of Phase II is discussed at greater length by Judge Martinez in the Culverts Order. *See* Culverts Order, 2007 WL 2437166, at *4-*5. Notably, although the State had argued that the Ninth Circuit's vacatur ought to be understood broadly, as a rejection of the tribes' position, the court disagreed. "The [appellate] court's order did not contain broad and conclusive language necessary to reject the idea of a treaty-based duty in theory as well as in practice. … [its] ruling, then, cannot be read as rejecting the concept of a treaty-based duty to avoid specific actions which impair salmon runs. The court did not find fault with the district court's analysis on treaty-based obligations, but rather vacated the declaratory judgment as too broad, and lacking a factual basis at that time. The court's language, however, clearly presumes some obligation on the part of the State …" *Id.*
[70] United States v. Washington, 759 F.2d at 1357.

numbers and thus an erosion of tribes' ability to exercise their treaty-guaranteed right to take fish. Thus, the district court in the culverts case considered the question "whether the Tribes' treaty-based right of taking fish imposes upon the State a duty to refrain from diminishing fish runs by constructing or maintaining culverts that block fish passage."[71]

In 2007, the district court ruled in favor of the tribes' request for a declaratory judgment to this effect on cross-motions for summary judgment. In finding that the state indeed had the duty urged by the tribes, Judge Martinez considered carefully the intent of the parties to the treaties, in accordance with "well-established principles of treaty construction," citing U.S. Supreme Court precedent for the instruction that "the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."[72] Judge Martinez began his analysis by quoting the Court's earlier work in the *U.S. v. Washington* line of decisions, but highlighted language underscoring that among the points of "taking" fish was, ultimately and obviously, eating fish.

> Governor Stevens and his associates were well aware of the "sense" in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and *the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent.* It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter "should be excluded from their ancient fisheries," and it is accordingly inconceivable that either party deliberately agreed to authorize future

[71] Culverts Order, 2007 WL 2437166, at *3.
[72] *Id.* at *6 (quoting State of Washington v. Washington State Commercial Passenger Fishing Vessel Association).

> settlers to crowd the Indians out of any meaningful use of their accustomed places to fish.[73]

Notably, Judge Martinez added the emphasis indicated to the material he quoted.

Judge Martinez quoted at length from expert testimony that focused explicitly on the role of the fish as food, forever – "for subsistence and for trade" – noting "[t]he significance of [the] right [to take fish] to the Tribes, its function as an incentive for the Indians to sign the treaties, and the Tribes' reliance on the unchanging nature of that right."[74] He recited from the declaration of historian Richard White:

> Stevens and the other negotiators anticipated that Indians would continue to fish the inexhaustible stocks in the future, just as they had in the past. Stevens specifically assured the Indians that they would have access to their normal food supplies now and in the future. At the Point Elliot Treaty, Stevens began by speaking of subsistence. "[A]s for food, you yourselves now, as in time past, can take care of yourselves." The question, however, was not whether they could now feed themselves, but rather whether in the future after the huge cessions that the treaties proposed the Indians would still be able to feed themselves. Stevens assured them that he intended that the treaty guarantee them that they could. *"I want that you shall not have simply food and drink now but that you may have them forever."*[75]

Judge Martinez noted the parties' likely understandings, given the reliability of the anadromous fishery resource in particular, the "abundance" of the fisheries in general, and their presumed "future

[73] *Id*. at *7 (quoting State of Washington v. Washington State Commercial Passenger Fishing Vessel Association, internal citation omitted, emphasis added by Judge Martinez).
[74] *Id*. at *7-*8.
[75] *Id*. at *9 (quoting Declaration of historian Richard White, emphasis added by Judge Martinez).

'inexhaustability.'"[76] These understandings, and Stevens' promises to the end that this would "forever" be the case, were what persuaded the tribes to sign the treaties. As Judge Martinez observed, "[i]t was not deemed necessary to write any protection for the resource into the treaty because nothing in any of the parties' experience gave them reason to believe that would be necessary." He then quoted historian Joseph Taylor:

> During 1854-55, white settlement had not yet damaged Puget Sound fisheries. During those years, Indians continued to harvest fish for subsistence and trade as they had in the past. Given the slow pace of white settlement and its limited and localized environmental impact, Indians had no reason to believe during the period of treaty negotiations that white settlers would interfere, either directly through their own harvest or indirectly through their environmental impacts, with Indian fisheries in the future. During treaty negotiations, Indians, like whites, assumed their cherished fisheries would remain robust forever.[77]

Thus, Judge Martinez concluded:

> [T]he representatives of the Tribes were personally assured during the negotiations that they could safely give up vast quantities of land and yet be certain that their right to take fish was secure. These assurances would only be meaningful if they carried the implied promise that neither the negotiators nor their successors would take actions that would significantly degrade the resource.[78]

Indeed, Judge Martinez observed, environmental degradation would not have been anticipated by the Indians not only because white settlement had not yet occasioned much by way of adverse environmental impacts, but also because the Indians regulated their own activities in order to prevent environmental harm and ensure the health of the fishery

[76] *Id.*
[77] *Id.* (quoting Declaration of historian Joseph E. Taylor, III).
[78] *Id.* at *10. .

resource.[79] Thus, according to Judge Martinez, "[s]uch resource-degrading activities as the building of stream-blocking culverts could not have been anticipated by the Tribes, who themselves had cultural practices that mitigated negative impacts of their fishing on the salmon stocks."[80]

The significance of the culverts order is widely recognized. While the state, in the wake of the Ninth Circuit's vacatur of the Phase II decision, may have harbored questions about the vibrancy of its treaty-based duty to avoid actions that impair the health of the salmon, its existence was explicitly confirmed by the culverts order. This duty, as the court stated, exists "in theory as well as in practice." Although the parties attempted to settle upon a schedule for the state to fix its stream-blocking culverts in view of this duty, they were unsuccessful and a bench trial on the remedies was held in 2010. On March 29, 2013, Judge Martinez granted the tribes' request for a permanent injunction, and denied the state's request for reconsideration of the court's 2007 culverts order.[81] Judge Martinez incorporated his earlier ruling in its entirety, reiterating that "[t]he Treaties were negotiated and signed by the parties on the understanding and expectation that the salmon runs were inexhaustible and that salmon would remain abundant forever."[82]

The tribes brought their claim to the court in the context of a discrete set of facts and Judge Martinez decided the question in this particularized context, carefully avoiding a broad, acontextual pronouncement.[83] Yet the court's rulings and reasoning in the culverts

[79] *Accord, e.g.,* TROSPER *supra* note 45; Johnsen, *supra* note 44. In the earliest times, when the balance of power still favored Native people, settlers too in some cases had to observe indigenous rules for consumption and resource management. As Joseph Taylor recounts in the context of the Columbia River Basin, "Clatsop and Chinooks delivered canoe loads of fish …but aboriginal rules still shaped the exchange. During ceremonial periods Indians continued to restrict consumption …Non-Indians grudgingly obeyed as long as Indians could force compliance, but repeated epidemics undermined aboriginal control." TAYLOR, *supra* note 45, at 60.

[80] Culverts Order, 2007 WL 2437166, at *10 (citing Declaration of Robert Thomas Boyd).

[81] Culverts Decision, No. 9213RSM, Subproceeding 01-1, slip op. at 32 (W.D. Wash. 2013).

[82] *Id.*

[83] Culverts Order, 2007 WL 2437166, at*10. Thus, Judge Martinez assured the State of Washington that "[t]his is not a broad 'environmental servitude' or the imposition of an

case send an unmistakable signal. Given an appropriately concrete factual context, the culverts decision can fairly be read to confirm the point that, as successors to the negotiators, federal and state governments may be held to account for the actions they take – or permit others to take – that significantly degrade the treaty resource. Given the court's concern with the *function* of the treaty resource, moreover – its role in securing food and a livelihood for the tribes – governments may be held to account for actions that compromise the treaty resource whether by depletion or by contamination. This point is developed further below, in Part VII.

It should be noted that the tribes' fishing rights encompass geographical areas throughout the Pacific Northwest. In Washington, for example, tribes' adjudicated usual and accustomed or "U & A" areas have been determined to consist in virtually the entirety of the waters within the state's exterior boundaries.[84] As a consequence, environmental standards applicable in this area – whether set by federal, tribal, or state governments – can affect tribes' rights and interests.

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affirmative duty to take all possible steps to protect fish runs as the State protests, but rather a narrow directive to refrain from impeding runs in one specific manner." *Id.* Similarly, in the Culverts Decision, Judge Martinez stated that "[t]he State's duty to maintain, repair or replace culverts which block passage of anadromous fish does not arise from a broad environmental servitude against which the Ninth Circuit Court of Appeals cautioned. Instead, it is a narrow and specific treaty-based duty that attaches when the State elects to block rather than bridge a salmon-bearing stream with a roadbed. The roadbed crossing must be fitted with a culvert that allows not only water to flow, but which insures the free passage of salmon of all ages and life stages both upstream and down. That passage is best facilitated by a stream simulation culvert rather than the less-effective hydraulic design or no-slope culvert." Culverts Decision, slip op. at 35.

[84] This is not to suggest that tribes' rights are limited to the state's exterior boundaries; rather, it is to say that insofar as the state asserts environmental regulatory authority over "the waters of Washington," these waters are burdened by tribes' pre-existing rights. For state recognition of this point, *see, e.g.,* Washington State Governor's Office of Indian Affairs, "Map of Reservations and Ceded Lands," *available at* http://www.goia.wa.gov/tribal_gov/documents/Tribal_Cedres.pdf; *see also,* Washington State Department of Transportation, Model Comprehensive Tribal Consultation Process for National Environmental Policy Act, Appendix B (July 2008) *available at* http://www.wsdot.wa.gov/environment/tribal (summarizing adjudicated "usual and accustomed" areas for western Washington tribes) (last visited Apr. 20, 2013).

B. Other Sources of Rights Unique to Tribes and Their Members

When the rights of tribes and their members are affected by state and federal agencies' decisions, there is a particular constellation of laws and commitments that comes into play. This constellation is unique to tribes – it would not be relevant were only other groups' interests affected, but it must be considered given that tribes' rights are at stake. Although it is beyond the scope of this article to discuss these laws and commitments, it is worth noting them here. In addition to the treaties and agreements between the U.S. and the Pacific Northwest tribes discussed above, numerous federal and state legal commitments recognize the unique duties owed to tribes and their members. Chief among these is the federal trust responsibility, under which doctrine the federal government is held to the heightened standards of a trustee in its decisions affecting tribal resources and rights. Although courts' recent interpretations of this trust responsibility in the context of agencies' environmental decisions have tended toward a narrow rather than robust understanding, the EPA at least has indicated its appreciation of a duty that flows from tribes' unique legal status under the Constitution, treaties, laws, executive orders, and court decisions and from the historical relationship between the federal government and tribal nations.[85]

Other obligations and commitments that are particular to tribes and their members stem from federal civil rights laws that prohibit recipients of federal funds (including state environmental agencies) from administering their programs in a way that discriminates against American Indians;[86]

[85] *See* Memorandum from Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency, to All EPA Employers (Jul. 22, 2009), *available at* http://www.epa.gov/tp/pdf/reaffirmation-memo-epa-indian-policy-7-22-09.pdf (last visited Apr. 20, 2013) (reaffirming EPA's 1984 Indian policy and explicitly acknowledging its trust responsibility to the tribes); U.S. Environmental Protection Agency, Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984), *available at* http://www.epa.gov/tp/pdf/indian-policy-84.pdf (last visited Apr. 20, 2013); *see generally*, COHEN, *supra* note 49, at 430-32. For a more expansive understanding of the federal government's trust responsibility regarding the ecosystems that support salmon, *see* NORTHWEST INDIAN FISH COMMISSION, TREATY RIGHTS AT RISK (2011) [hereinafter NWIFC, TREATY RIGHTS AT RISK].

[86] Civil Rights Act of 1964 § 106, 42 U.S.C. § 2000d (2012); 40 C.F.R. § 7 (2012).

U.S. commitments under international law to protect the rights of indigenous peoples, including rights to traditional resources and to hunt, fish, and gather; [87] federal and state commitments to work with tribes on a government-to-government basis, in furtherance of tribal self-determination; [88] and federal and state commitments to further environmental justice, including specific mention of the need to protect subsistence fishing.[89]

C. Environmental Management Affecting Tribes' Rights to Fish

Federal, state, and tribal governments are all successors in interest to the treaty promises. Each of these governments is therefore bound to pursue the treaties' goals. This point is important because, at present, myriad decisions that result in depletion and contamination of the fish resource get made by non-tribal governments.

For starters, pollution is a notorious scofflaw. It doesn't respect jurisdictional boundaries. So, even if tribes' interests in the health of the fish resource were confined within the borders of their reservations, decisions by "upstream" governments, e.g., about the quantities of contaminants they will permit to be discharged into a particular river or the degree of cleanup they will require of a contaminated site on a particular bay, would often impact "downstream" tribal interests.

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[87] UNITED STATES MISSION TO THE UNITED NATIONS, ANNOUNCEMENT OF U.S SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 6, 8 (2011), *available at* http://usun.state.gov/documents/organization/153239.pdf (last visited Apr. 20, 2013) (acknowledging that the Declaration calls upon the U.S. to acknowledge the "interests of indigenous peoples in traditional lands, territories, and natural resources," and recognizing "that many indigenous peoples depend upon a healthy environment for subsistence fishing, hunting and gathering" and that various Declaration provisions address the consequent need for environmental protections).

[88] *See, e.g.*, WASHINGTON GOVERNOR'S OFFICE OF INDIAN AFFAIRS, CENTENNIAL ACCORD BETWEEN THE FEDERALLY RECOGNIZED INDIAN TRIBES IN WASHINGTON STATE AND THE STATE OF WASHINGTON (1989), *available at* http://www.goia.wa.gov/Government-to-Government/Data/CentennialAccord.htm (last visited Apr. 20, 2013).

[89] *See, e.g.*, EXECUTIVE ORDER 12,898: FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS (Feb. 11, 1994) (singling out the issue of "subsistence consumption of fish and wildlife" in section 4-4, the only subject matter issue receiving specific mention in the Executive Order).

But, as noted above, tribes' rights and interests in the fish also extend beyond reservation boundaries. Indeed, in Washington, adjudicated tribal "usual and accustomed" fishing places under the treaties have been recognized to cover virtually the entirety of the state's waters. Yet, on current understandings, environmental management authority for the vast expanse of waters outside of the reservations boundaries that support the salmon and other fish resides largely in non-tribal governments.[90] Put another way, even if tribal governments work to prevent contamination and depletion and to restore degraded aquatic environments to the fullest extent of their current regulatory authority,[91] tribes' reserved fishing rights are susceptible to being eviscerated by non-tribal management decisions over off-reservation waters.

Tribal environmental management, historically, was crucial to the health of the region's aquatic ecosystems and went hand-in-hand with tribal harvest. Despite a bleak intervening period in which tribal self-determination and governance were challenged as the U.S. embraced policies of assimilation and termination, tribes have worked to keep their legacies as environmental custodians intact.[92] Tribes today are co-managers of the fishery harvest and leaders in environmental regulation

[90] *Cf*. United States v. Washington, 384 F. Supp. 312, 340-42 (W.D. Wash. 1974) (recognizing co-management of harvest by tribes and state).

[91] For a discussion of the sources and contours of tribal environmental management authority in Indian country, *see* COHEN, *supra* note 49, chapter 10. Briefly, tribal environmental management authority is understood to stem from two sources. First, tribes possess inherent powers of self-government. While these powers may be limited in certain respects by federal law, tribes nonetheless retain substantial authority over matters affecting tribal health and welfare. *Id*. at 784. Second, tribes also may exercise powers authorized by Congress. Many environmental statutes, including the federal Clean Water Act, have authorized tribes to assume "primacy" for administering environmental regulatory programs in Indian Country. *Id*. at 787. It is worth noting that, once tribal water quality standards have been approved under the CWA by the EPA, they – like state standards – have been viewed by EPA as imposing certain obligations on "upstream" states to ensure the latter do not issue permits that would result in a violation of "downstream" tribal standards, and courts have upheld this view. *See, e.g.,* City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996). This potential "extra-territorial" impact for tribal WQS obviously has implications for the ability of tribal environmental managers to affect the health of the fish resource.

[92] *See, e.g.,* CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2005).

and habitat restoration.[93] Yet because of the limited reach of tribal environmental regulatory authority, tribes' efforts must be met with efforts by non-tribal governments if our aquatic ecosystems are to be healthy and resilient and our fisheries robust. As the next Part outlines, the task ahead is not small, given the current degraded state of the habitat, and the consequent depletion and contamination of the fish.

III. FISHERIES – DEPLETION AND CONTAMINATION

Since the time of the treaties, depletion and contamination have increasingly threatened the salmon and other fish resources. The dire state of aquatic environments throughout the Pacific Northwest has led to various designations that at once highlight the imperiled condition of a species or stretch of water and put in motion the machinery of protection under various environmental laws. Thus, several species of salmon (as well as other species, such as the orca, that depend on salmon) have been listed as "threatened" or "endangered" under the Endangered Species Act;[94] miles of streams and rivers and acres of lakes have been deemed "impaired" under the CWA;[95] scores of "sites" have been designated for cleanup of contaminated sediments under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Washington's Model Toxics Control Act (MTCA);[96] and whole systems have been singled out for attention, including the Puget

[93] United States v. Washington, 384 F. Supp. at 340-42. Indeed, tribal water quality standards currently employ the most protective fish consumption rates in the nation. The Confederated Tribes of the Umatilla Indian Reservation, for example, employ a FCR of 389 g/day in its WQS. In some cases, however, these progressive tribal standards have been in place for years, but await EPA approval before they will function as WQS within the meaning of the CWA. This is the case, for example, with the Spokane Tribe's standards, which employ a FCR of 865 g/day.

[94] *See* National Oceanic & Atmospheric Administration, *supra* note 21.

[95] *See* U.S. Environmental Protection Agency, Watershed Assessment, Tracking, and Environmental Results, "National Summary of Impaired Waters & TMDL Information," *available at* http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T#imp_water_by_state (last visited Apr. 18, 2013).

[96] PUGET SOUND PARTNERSHIP, 2007 PUGET SOUND UPDATE 139 (2007), *available at* http://www.psp.wa.gov/documents.php [hereinafter PSP, 2007 UPDATE] (last visited Apr. 20, 2013) (compiling list of over 600 sites in the Puget Sound undergoing or awaiting remediation of contaminated marine sediments under federal or state cleanup laws).

Sound and the Columbia River Basin.[97] These actions have been accompanied by several major efforts to assess the health of the salmon and its watersheds; to gauge our progress in addressing threats to salmon recovery; and to judge our success in honoring our obligations as successors to the treaties.[98] These report cards, sadly, deliver poor marks in virtually every category.

This place – the Pacific Northwest – has been greatly altered. In countless ways, it is less hospitable to the salmon and other fish resources than when it resided exclusively in tribal custody. The numbers are grim. Since statehood in 1889, Washington has lost some 70% of its estuarine wetlands, 50% of its riparian habitat, and 90% of its old-growth forest.[99] In the Puget Sound, much of the nearshore habitat that is vital to forage fish and that serves as a refuge and feeding ground on salmon's migratory path has been modified (40%) or armored (27%).[100] For example, although the 2007 Chinook Recovery Plan instructs that impervious surfaces be minimized, and lists this among its key strategies for recovering the salmon, impervious surface cover increased by 35% in Puget Sound between 1986 and 2006.[101] Impervious surfaces lead to increased stream temperatures and decreased biodiversity (including a loss of insect and prey fish species).[102] Indeed, many of these alterations have multiple adverse effects on the salmon, depriving them of suitable habitat and food, and permitting what little remains to be poisoned, as the

[97] Both the Columbia River Basin and the Puget Sound-Georgia Basin have been designated by EPA as priority Large Aquatic Ecosystems. *See* U.S. Environmental Protection Agency, "Large Aquatic Ecosystems," *available at* http://water.epa.gov/aboutow/owow/programs/large_aquatic.cfm (last visited Apr. 20, 2013).
[98] NWIFC, 2012 SOW, *supra* note 30; NATIONAL MARINE FISHERIES SERVICE, 2011 IMPLEMENTATION STATUS ASSESSMENT FINAL REPORT: A QUALITATIVE ASSESSMENT OF IMPLEMENTATION OF THE PUGET SOUND CHINOOK RECOVERY PLAN (Millie Judge); NWIFC, TREATY RIGHTS AT RISK, *supra* note 85; EPA AND CRITFC, COLUMBIA RIVER BASIN CONTAMINANT SURVEY (2002), *available at* http://yosemite.epa.gov/r10/oea.nsf/0/C3A9164ED269353788256C09005D36B7?OpenDocument (last visited Apr. 18, 2013) [hereinafter EPA AND CRITFC, COLUMBIA RIVER BASIN CONTAMINANT SURVEY]; PSP, 2007 UPDATE, *supra* note 96.
[99] NWIFC, 2012 SOW, *supra* note 30, at 18.
[100] *Id.* at 19.
[101] *Id.* at 14.
[102] *Id.*

urban toxic soup or rural pesticide slurry is quickly ushered into streams, lakes, bays, and coasts.

Water quality throughout the region has suffered, and the waters and sediments that are home to the salmon and other fish are also now home to a host of toxic contaminants.[103] Urbanized embayments, shorelines, and rivers tend to be more contaminated than less industrialized areas, although agricultural and silvicultural activities lead to contamination in rural areas as well. Many of these anthropogenic toxicants are harmful to the fish, and associated with increased morbidity and mortality; many of these toxicants also bioaccumulate in fish tissue, and so are harmful to all those that consume the fish. Thus, toxic pollution contributes to both depletion and contamination of the fishery resource. Chinook salmon from the Puget Sound are significantly more contaminated than their counterparts outside the Puget Sound, i.e., in the Georgia Strait, along the outer Washington and Oregon coasts, or in Alaska. Recent evidence showed, for example, that Chinook from sites in Puget Sound contained PCBs at three to five times the levels of Chinook from comparison sites elsewhere.[104] Pacific herring, an important forage fish for salmon, displays a similar geographic pattern in their contaminant levels. Pacific herring from central and southern Puget Sound harbored PCBs at levels four to nine times higher than those from Georgia Basin sites, as evidenced by samples from 1999 to 2004.[105] The most recent data bear out this geographical differential. For Pacific herring, whole body samples from South Puget Sound contained 120-160 ppb PCBs, from the North Puget Sound contained 18 to 41 ppb PCBs, and from coastal ocean locations contained 4 to 12 ppb PCBs.[106] Dungeness crab

[103] *See, e.g.,* NWIFC, TREATY RIGHTS AT RISK, *supra* note 85 at 10 (noting that, in 2008, "83 percent of waters sampled to compile the state's 305(b) and 303(d) Clean Water Act lists violate state water quality standards and are polluted"); *see generally*, PSP, 2007 UPDATE, chapter 4 "Toxic Contamination."

[104] O'Neill & West, *supra* note 27, at 622; *see generally*, PSP, 2007 UPDATE, *supra* note 96, at 153-56.

[105] PSP, 2007 UPDATE, *supra* note 96, at 152.

[106] James E. West, et al., *Spatial Extent, Magnitude, and Patterns of Persistent Organochlorine Pollutants in Pacific Herring (*Clupea pallasi*) Populations in the Puget Sound (USA) and Strait of Georgia (Canada)*, 394 SCIENCE OF THE TOTAL ENVIRONMENT 369 (2008); James E. West, "Persistent Bioaccumulative and Toxic Contaminants in South Puget Sound's Pelagic Food Web," Presentation at the Fourth Annual South

from an urban location in Puget Sound had six times the PAH levels of Dungeness crab from two non-urban locations.[107]

In absolute terms, the levels of toxic contaminants present in aquatic environments and fish tissue pose reason for concern, with lethal and sub-lethal impacts to the fish. The Puget Sound Partnership, for example, reports that "pre-spawn mortality occurred in 25 to 90 percent of female coho salmon returning to urban streams in the Puget Sound region between 2002 and 2005, suggesting that contaminants from stormwater are posing a threat to the spawning success of salmon in urban streams."[108] Juvenile Chinook salmon from the South Puget Sound have been shown to harbor PCBs in concentrations from 2,500 to 10,000 ng/g lipid, well above the 2,400 ng/g lipid threshold for adverse effects such as depressed growth.[109] Pacific herring embryos have been shown to be exposed to PAHs at some locations in Puget Sound at levels above the threshold for mortality.[110] Pacific herring is a pelagic species, but it spawns adhesive eggs on intertidal and shallow subtidal structures, especially on algae and seagrasses. Its shoreline habitats are particularly susceptible to PAH inputs from sources originating onshore (e.g., runoff and river inputs) and to large and small oil spills.[111]

Contamination is present in the fish at levels that also pose a risk to humans. For example, the Columbia River Basin Contaminant Survey,

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Sound Science Symposium, Squaxin Island (Oct. 30 2012) [hereinafter, West, South Sound Science Symposium Presentation]; E-mail from James E. West to Catherine A. O'Neill, Feb. 6, 2013 (noting that new methods of calculating total PCBs mean that these figures likely underestimate the "true concentrations" of PCBs by "around 33%").

[107] PSP, 2007 UPDATE, *supra* note 96, at 166 (comparing PAHs in Dungeness crab from the Thea Foss Waterway with Dungeness crab from Vendovi Island and the Cherry Point shoreline).

[108] *Id.* at 131.

[109] West, South Sound Science Symposium Presentation, *supra* note 105 (citing James P. Meador, et al., *Use of Tissue and Sediment-Based Threshold Concentrations of Polychlorinated Biphenyls (PCBs) to Protect Juvenile Salmonids Listed Under the US Endangered Species Act*, 12 AQUATIC CONSERVATION: MARINE AND FRESHWATER ECOSYSTEMS 493 (2002) for source of threshold level of 2,400 ng/g lipid).

[110] PSP, 2007 UPDATE, *supra* note 96, at 170-71 (discussing results of experiments showing PAH exposure for Port Orchard/Port Madison sites at levels above 22 ppb threshold at which malformation and ultimately death resulted for exposed herring embryos).

[111] *Id.*

conducted jointly by EPA and CRITFC, tested fish tissue and eggs from twelve anadromous and resident species at twenty sites in the Columbia River Basin.[112] The fish tissues were analyzed for 132 chemicals including 26 pesticides, 18 metals, a host of PCBs, dioxins, furans, and 51 miscellaneous organic chemicals. Of these 132 chemicals, 92 were detected and "all species of fish had some levels of toxic chemicals in their tissues and in the eggs of Chinook and coho salmon and steelhead."[113] Some of these chemicals are carcinogens, some are harmful to human health in other ways. Toxicologists speak in terms of degrees of "risk" when discussing carcinogens, on the theory that there is no threshold below which exposure to these chemicals will not have adverse effects.[114] Toxicologists speak in terms of "hazard" when discussing non-carcinogens, on the theory that a threshold dose can be identified below which exposure to these chemicals can be said to be safe.[115] Both carcinogens and non-carcinogens pose a concern for people who eat relatively large amounts of fish from the Columbia River Basin. When one considers particular species or sites, the risk levels are sobering. For example, at a site between the John Day and McNary dams, a person consuming fish at contemporary levels documented in the CRITFC survey (389 g/day) has an excess cancer risk between 1 in 100 and 1 in 1000 for all four species surveyed (i.e., steelhead, fall Chinook, largescale sucker, and white sturgeon).[116] The hazards from non-carcinogens can also far exceed levels deemed "safe" by EPA. For example, a woman consuming walleye from the Umatilla River at this same contemporary level (389 g/day) is exposed to methylmercury at a level nearly ten times EPA's "reference dose."[117] Because methylmercury is a potent neurotoxin, the

[112] EPA AND CRITFC, COLUMBIA RIVER BASIN CONTAMINANT SURVEY, *supra* note 98.
[113] *Id.* at E-3.
[114] CASSARETT & DOULL'S TOXICOLOGY: THE BASIC SCIENCE OF POISONS 116 (Curtis D. Klaassen, ed., 7th ed. 2008).
[115] *Id.*
[116] EPA AND CRITFC, COLUMBIA RIVER BASIN CONTAMINANT SURVEY, *supra* note 98, at app. N, 2-3 and fig. 6-26. This estimate of risk is for whole body samples and assumes a 70-year (i.e., a lifetime) exposure duration. Environmental agencies generally consider a risk level of 1 in 1,000,000 to be "acceptable" for regulatory purposes. *See* discussions at Part V.B and Part VI.E, *infra.*
[117] *Id.* at app. B1. This estimate is for Umatilla walleye or similarly contaminated species. Three fillet fish tissues samples from the Umatilla River registered methylmercury at concentrations of 0.16 mg/kg; 0.16 mg/kg, and 0.2 mg/kg. The EPA's reference dose, or

adverse impacts are also felt by the next generation, as a developing fetus is particularly susceptible. When one considers multiple species from various sites, the risk levels may improve somewhat, but the figures are still troubling. For an adult consuming at contemporary levels documented in the CRITFC survey (389 g/day) and consuming a mix of species as documented by the survey, "[h]azard indices (less than or equal to 8 at most sites) and cancer risks (7 in 10,000 to 2 in 1,000) were lowest for salmon, steelhead, eulachon and rainbow trout and highest (hazard indices greater than 100 and cancer risks up to 2 in 100 at some sites) for mountain whitefish and white sturgeon."[118] The hazard indices for children at the average and high contemporary ingestion rates documented in the CRITFC survey "were 1.9 times greater than those for adults in CRITFC's member tribes at the average and high ingestion rates, respectively."[119]

Fish consumption advisories blanket the region's waters. Washington, for example, has issued a statewide advisory for mercury.[120] Rivers, including the Pend Oreille, Spokane, Walla Walla, Okanogan, and several portions of the Columbia, are under advisory for various toxic contaminants, ranging from PCBs, to DDT, to PBDEs, to lead.[121] Lakes around the state of Washington are similarly under advisory; for example, advisories for Lake Washington direct people to avoid or restrict consumption of northern pikeminnow, carp, cutthroat trout, yellow perch,

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RfD, for methylmercury is 0.1 µg/kg bodyweight/day, whereas a woman consuming at this contemporary tribal rate is exposed to methylmercury at a dose of 0.96 µg/kg bodyweight/day. This estimate uses the 0.16 mg/kg value for methylmercury concentration and assumes that the average woman weights 65 kg.

[118] Id. at E-6 to E-7. "Hazard indices and cancer risks were also estimated using a hypothetical multiple species diet. This hypothetical multiple species diet was based upon information from the CRITFC fish consumption study (CRITFC, 1994). The hazard indices and cancer risks for the multiple species diet were lower than those for most contaminated species of fish and greater than those for some of the least contaminated species. The risks for eating one type of fish may be an over or underestimate of the risks for consumers of a multiple-species diet depending upon the types of fish and concentration of chemicals in the fish which make up the diet." Environmental agencies generally aim for a Hazard Index of no more than 1.0 for regulatory purposes.

[119] *Id.* at E-7.

[120] Washington Department of Health, "Fish Consumption Advisories" *available at* http://www.doh.wa.gov/CommunityandEnvironment/Food/Fish/Advisories.aspx (last visited Apr. 20, 2013).

[121] *Id.*

sockeye salmon, rainbow trout, and pumpkin seed.[122] And mercury and PCBs are responsible for advisories regarding Dungeness and other crab, salmon, rockfish, and flatfish in Puget Sound.[123]

Whereas someone in the general population might, in the face of fish consumption advisories, look to substitute food sources with relatively modest accommodations of palate or pocketbook, a member of the fishing tribes might view such risk avoidance as impossible.[124] As Del White, Nez Perce, explains: "People need to understand that the salmon is part of who the Nez Perce people are. It is just like a hand that is part of your body." [125] The next Part takes up efforts to document tribal fish consumption practices, past, present, and future, in an attempt to support environmental standards that clean up and restore degraded environments. By this means, depletion and contamination of the fish can be addressed, and the attendant risks to all those who depend on the fish can be reduced, rather than avoided.

IV. TRIBAL FISH CONSUMPTION PAST, PRESENT AND FUTURE

Fish and all of the lifeways associated with the fish are essential to tribal health and well-being, today as in the past. Fish consumption is thus an embedded practice. Fish are vital to tribal people for the nutrients they provide, of course, but fish consumption is also imbued with social meaning. Every facet of managing, harvesting, distributing, and honoring the fish is woven into the fabric of tribal life. These practices and the knowledge they beget form a central part of the inheritance of each succeeding generation. For this reason, the salmon have been described as a "cultural keystone species" for the Indian peoples of the Pacific Northwest.[126] Fish are important for each individual tribal member, and for

[122] *Id.*
[123] *Id.*
[124] *See* Catherine A. O'Neill, *Risk Avoidance, Cultural Discrimination, and Environmental Justice for Indigenous Peoples*, 30 ECOLOGY L.Q. 1 (2003); Catherine A. O'Neill, *No Mud Pies: Risk Avoidance as Risk Regulation*, 31 VT. L. REV. 273 (2007).
[125] DAN LANDEEN & ALLEN PINKHAM, SALMON AND HIS PEOPLE: FISH AND FISHING IN NEZ PERCE CULTURE 156 (1999).
[126] Ann Garibaldi & Nancy Turner, *Cultural Keystone Species: Implications for Ecological Conservation and Restoration* 9 ECOLOGY AND SOCIETY 1 (2004); *accord* Donatuto & Harper, *supra* note 14, at 1500 (explaining that, for the tribes of the Pacific Northwest,

the tribe as a whole – necessary for health and well-being broadly understood to include not only physiological, but also cultural and spiritual dimensions.[127] As depicted in artwork by Swinomish carver and painter Kevin Paul that graced a recent study, fish are "food for the body, food for the soul."[128]

In the light of this context, a "fish consumption rate" is just a number. But, given that many environmental standards rest on quantitative assessments of the "risk" or "hazard" that will result from exposure to a particular level of contaminants, this number becomes crucial. Fish intake is the primary means by which humans are exposed to a host of toxicants, and the rate of fish consumption turns out to be one of the drivers in the degree of protectiveness of standards affecting water quality.[129] So in order to speak to these risk-based standards, tribes have quantified their rates of fish intake and documented other aspects of tribal consumption practices. And, in keeping with their vision for a future in

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"fish represent a cultural keystone species—species that have significant meaning and identity in tribal values and practices and as such are used in family and place names, educational stories, and ceremonies. Impacts to cultural keystone species degrade overall cultural morale. Therefore, degradation of traditional foods, for example, via contamination, directly impacts the physical health of those consuming the food and is regarded, equally, as an attack on beliefs and values through the 'acknowledged relationship of the people with the land, air, water, and all forms of life found within the natural system.'") (quoting SUQUAMISH TRIBE, FISH CONSUMPTION SURVEY OF THE SUQUAMISH INDIAN TRIBE OF THE PORT MADISON INDIAN RESERVATION, PUGET SOUND REGION (2000)).

[127] *See, e.g.,* Jamie Donatuto et al., *Poisoning the Body to Nourish the Soul: Prioritizing Health Risks and Impacts in a Native American Community.* 13 HEALTH, RISK, AND SOCIETY 103 (2011).

[128] *See* Donatuto & Harper, *supra* note 14, at fig 1., "Swinomish Seafood Spiral"); magnet with artwork and text distributed by Swinomish Indian Tribal Community (on file with author).

[129] Humans are exposed to toxic contaminants in water by means of other routes as well, including via ingestion of water and dermal contact with water and sediments. For these other routes of exposure, too, tribal members are often more exposed than members of the general U.S. population. *See, e.g.,* Barbara L. Harper, et al., *The Spokane Tribe's Multipathway Subsistence Exposure Scenario and Screening Level RME*, 22 RISK ANALYSIS 513 (2002) [hereinafter, Harper, et al., *Spokane Exposure Scenario*]. While this article focuses on exposure via fish consumption for reasons of scope, it is important to consider a more complete and complex picture of how contaminants impact the health and well-being of tribes and their members. *See generally,* Stuart G. Harris, *Risk Analysis: Changes Needed from a Native American Perspective*, 6 HUMAN & ECOLOGICAL RISK ASSESSMENT 529 (2000).

which contamination is cleaned up, ecosystems are resilient, fisheries are healthy, and tribal exercise of their fishing rights is robust, tribes have also sought to contextualize the inquiry and broaden the question.

A. Historical Fish Consumption Practices and Rates

The tribes of the Pacific Northwest are fishing peoples. Historically, fish were vital to tribal life – a central feature of the seasonal rounds by which food was procured for ceremonial, subsistence, and commercial purposes. This fact is self-evident to tribal people. It has also been recognized by U.S. courts, which have observed that, at treaty times, "fish was the great staple of [Indians'] diet and livelihood,"[130] and thus fishing rights "were not much less necessary to the existence of the Indians than the atmosphere they breathed."[131]

There are ample data documenting the role of fish as a dietary mainstay for Indian people prior to contact and at the time of the treaties. There were differences, of course, in the species relied upon and the quantities consumed, from group to group and from year to year. Nonetheless, there is no doubt that fish comprised a staple source of calories, protein, and other nutrients for tribal people throughout the Pacific Northwest. These data, moreover, drawn from multiple lines of scientific evidence, have supported quantified estimates of historical consumption rates. For example, Deward Walker has estimated pre-dam fish consumption rates for the Columbia River tribes (Umatilla, Yakama, and Nez Perce), based on a review of the ethnohistorical and scientific literature. Walker has quantified total fish consumption for these peoples at 1000 g/day.[132] Earlier estimates, for example, by Gordon Hewes, produced figures of similar magnitude. Hewes estimated salmon consumption rates for the Cayuse at 365 pounds/year (453.6 g/day) and

[130] Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 665 n.6 (1979) (citations and internal quotation marks omitted).
[131] United States v. Winans, 198 U.S. 371, 381 (1905).
[132] A. SCHOLTZ, ET AL., COMPILATION OF INFORMATION ON SALMON AND STEELHEAD TOTAL RUN SIZE, CATCH, AND HYDROPOWER-RELATED LOSSES IN THE UPPER COLUMBIA RIVER BASIN, ABOVE GRAND COULEE DAM, Fisheries Technical Report No. 2, Upper Columbia United Tribes Fisheries Center, Eastern Washington University (1985).

for the Umatilla and Walla Walla at 500 pounds/year (621.4 g/day).[133] Hewes' estimates for the Puget Sound tribes were similar. For example, he estimated salmon consumption rates for the Lummi and Nooksack tribes at 600 pounds/year (745.6 g/day), for the Clallam at 365 pounds/year (453.6 g/day) and for the Puyallup, Nisqually, and various other tribes at 350 pounds/year (435 g/day).[134] These and other data have been enlisted in peer-reviewed methodologies for quantitative exposure estimates for various Pacific Northwest tribes. For example, Barbara Harper, et al. concluded that "[h]istorically, the Spokane Tribe consumed roughly 1,000 to 1,500 grams of salmon and other fish per day."[135]

The substantial degree to which fish were relied upon by the tribes at treaty time was emphasized in evidence before the court in *U.S. v. Washington.* Among the findings of fact in that case, Judge Boldt cited the following figure: "Salmon, however, both fresh and cured, was a staple in the food supply of these Indians. It was annually consumed by these Indians in the neighborhood of 500 pounds per capita [i.e., 621.4 g/day]."[136]

B. Contemporary, "Suppressed" Fish Consumption Rates

In contrast to estimates of historical fish consumption rates, recent surveys of tribal populations produce estimates of contemporary fish consumption rates. It is important to recognize that these snapshots of contemporary practices are distorted due to suppression.

> "A 'suppression effect' occurs when a fish consumption rate (FCR) for a given population, group, or tribe reflects a

[133] Gordon W. Hewes, *Indian Fisheries Productivity in Pre-Contact Times in the Pacific Salmon Area*, 7 NORTHWEST ANTHROPOLOGICAL RESEARCH NOTES 133, 136 (1973).
[134] *Id.*
[135] Harper, et al., *Spokane Exposure Scenario*, *supra* note 129, at 518. Harper, et al. improved upon the earlier estimates, among other things by accounting for the greater caloric requirements of an active, subsistence way of life. Thus, for example, while Hewes' estimates assumed a 2000 kcal/day energy requirement, Harper, et al. used a 2500 kcal/day figure, "based on a moderately active outdoor lifestyle and renowned athletic prowess" of Spokane tribal members. *Id.* at 517.
[136] United States v. Washington, 384 F. Supp. 312, 380 (W.D. Wash. 1974) (discussing Yakama consumption).

> current level of consumption that is artificially diminished from an appropriate baseline level of consumption for that population, group, or tribe. The more robust baseline level of consumption is suppressed, inasmuch as it does not get captured by the FCR."[137]

Note that suppression effects may infect attempts to assess consumption practices for various subpopulations or for the general population as well. For example, consumption surveys of women of childbearing age may reflect a current level of consumption that is diminished from levels that women in this group *would* consume, but for the existence of fish consumption advisories due to mercury contamination.[138] However, when tribes are affected, there are two important differences. First, the "appropriate baseline level of consumption" is clear for tribes, whereas it may be subject to debate for other groups. Only tribes have legally protected rights to a certain historical, original, or heritage baseline level of consumption. Second, the causes of suppression have exerted pressure on tribes for a longer period, and in more numerous ways, than on the general population. Whereas those in the general population may have begun to reduce their intake of fish in response to consumption advisories once these became more prevalent in the 1970s and thereafter, tribal members have been excluded from their fisheries, and harassed and imprisoned for exercising their fishing rights, from shortly after the ink on the treaties dried. Indeed, the forces of suppression, often perpetrated or permitted by federal and state governments, have included inundation of fishing places; depletion and contamination of the fishery resource; and years of prosecution, intimidation, and gear confiscation.[139]

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[137] NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, FISH CONSUMPTION AND ENVIRONMENTAL JUSTICE, 43-45 (2002).

[138] Emily Oken, et al., *Decline in Fish Consumption Among Pregnant Women After a National Mercury Advisory*, 102 OBSTETRICS & GYNECOLOGY 346 (2003) (finding that pregnant women with access to obstetric care decreased fish consumption in response to publication of federal advisory warning of mercury contamination in certain species of fish).

[139] Tribal leaders have long observed the myriad causes of suppression operating to diminish tribal fishing and fish consumption. These are usefully summarized in Donatuto

As a consequence, contemporary surveys of tribal populations produce fish consumption rates that are artificially low compared to the appropriate, treaty-guaranteed baseline. The bias introduced by suppression effects, together with tribes' treaty-secured right to catch and consume fish at more robust historical rates, means that it is inaccurate to refer to contemporary figures as "tribal fish consumption rates." Indeed, the snapshot of contemporary consumption practices provided by recent surveys arguably represents a nadir – a low point from which tribes are working to recover as environments are restored and traditional practices reinvigorated.

Rather, contemporary surveys of tribal populations are properly viewed alongside other surveys used to document contemporary fish consumption by the general population and relied upon by government agencies in the environmental regulatory context. These studies of tribal populations are generally conducted in accordance with the conventions of western science, and have been found to be technically defensible by federal and state governments.[140] These studies have been conducted under governmental or inter-governmental auspices, and subjected to internal and external peer review. As such, these studies follow the practice of studies of the national population that have been relied upon by EPA to set its default fish consumption rate for the general population.[141]

In fact, to the extent that contemporary surveys of tribal populations have erred on the side of following conventions developed for general population surveys, they may underestimate even contemporary tribal

& Harper, *supra* note 14 at 1500-01; *accord* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW IN INDIAN COUNTRY 25 (2005) ("In the latter half of the nineteenth century, the fishing grounds were quickly enclosed. … In hundreds of confrontations, the Indians met owners who hadn't heard of the fishing 'servitude,' or who didn't believe in it; who knew for sure that access was not here but over there; who would let the gates down, but only for a small and reasonable fee; who would insist the fishery was a private one; …The Indians would be introduced to fences and road closures and padlocks and abutments and signs and guard dogs and firearms that were among the pleasures of all fee-simple property owners….Litigation would begin in 1884, and in a fundamental sense, it would never end. Treaty fishing lawsuits continue today into the 21st century.").

[140] This point is discussed further *infra* at notes 238-41 and accompanying text.

[141] *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, METHODOLOGY FOR DERIVING AMBIENT WATER QUALITY CRITERIA FOR THE PROTECTION OF HUMAN HEALTH (2000) [hereinafter EPA, AWQC METHODOLOGY].

consumption rates.[142] Thus, for example, the study of the Tulalip and Squaxin Island tribes and the study of the Columbia River tribes both hewed to the statistical convention that "outliers" – in this case, representing high-end fish consumption rates – are treated as likely the result of error (for example, in recording a respondent's fish consumption rate) rather than a true value. As such, it is a frequent practice for such outlier data points to be omitted from the dataset that then forms the basis of population values (e.g., the mean, or the 90th percentile) or to be "recoded" to coincide with a number closer to the bulk of the population, such as a number equal to three standard deviations from the mean.[143] But, as has been recognized, some tribal members – particularly those from traditional and fishing families – in fact consume very large quantities of fish, even in contemporary times. Tribal researchers at Umatilla, for example, identified a subset of interviewees (35 of 75) who are "traditional fishers" and who confirmed eating fish "two to three times a day in various forms."[144] The average consumption rate for this group was found to be 540 g/day. Notably, the relatively high fish consumption rates indicated by this subset of tribal members reflect *actual* contemporary consumption, not – as assumed for so-called outliers – error. When outliers are treated automatically as errors, according to statistical convention, the effect is to depress the various percentile values and, importantly, to fail to reflect the consumption practices of those tribal members whose practices today are most consonant with practices guaranteed to the tribes by treaty and to which tribes, in an exercise of cultural self-determination, seek to return. A host of other conventions, detailed by tribal researchers, similarly

[142] *See, e.g.*, Donatuto & Harper, *supra* note 14.
[143] *But cf.* U.S. ENVIRONMENTAL PROTECTION AGENCY, GUIDELINES FOR EXPOSURE ASSESSMENT 65 (1992), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=15263 (last visited Apr. 20, 2013) [hereinafter EPA, EXPOSURE ASSESSMENT GUIDELINES] (stating, in contrast to this frequent practice, that "[o]utliers should not be eliminated from data analysis procedures unless it can be shown that an error has occurred in the sample collection or analysis phases of the study. Very often outliers provide much information to the study evaluators.").
[144] Stuart G. Harris & Barbara L. Harper, *A Native American Exposure Scenario*, 17 RISK ANALYSIS 789 (1997).

operate so that, together, these surveys likely underestimate even contemporary tribal fish consumption rates.[145]

Additionally, depending on the time period that is covered by a survey, the recorded rates may undercount contemporary intake if the period is one of relatively low harvest. This has been shown to be the case, for example, for the years in the early 1990s canvassed by the CRITFC survey, during which the tribal harvest was significantly reduced from more recent years, coinciding with severe reductions in fish availability in the Columbia River Basin, for example, 80% for summer Chinook and 94% for fall Chinook.[146] With this concern in mind, the Lummi Nation opted in its recent survey to document consumption practices and rates for the year 1985, a period in contemporary time in which the harvest was more robust than at present, although still suppressed relative to the time of the treaties.[147]

While contemporary rates are not representative of treaty-guaranteed practices, surveys of contemporary tribal consumption document rates of fish intake that are nonetheless markedly greater than for the general population. According to the national survey on which the EPA bases its current default recommendations, the mean fish consumption rate is 7.5 g/day; the 50th percentile rate is 0 g/day; the 90th percentile rate is 17.5 g/day; and the 99th percentile rate is 142.4 g/day.[148]

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[145] *See, e.g.,* Donatuto & Harper, *supra* note 14.

[146] Letter from Babtist Paul Lumley, Executive Director, CRITFC, to Ted Sturdevant, Director, Washington State Department of Ecology 3 (Mar. 19, 2012) (pointing to "the fact that more than 61% of the survey respondents reported that their fish consumption was suppressed by poor fish harvests during the early 1990's" and observing that "[f]ish counts at Lower Granite Dam, reported by the US Army Corps of Engineers (USACE) confirm that spring and summer Chinook availability in the Columbia Basin at the time of the CRITFC survey (1991-1992) was close to 80% lower … and fall Chinook was 94% lower than [in 2002]. Fish availability is similar today compared to 2002 and continues to improve for fall Chinook").

[147] LUMMI NATION SEAFOOD CONSUMPTION STUDY, *supra* note 15, at 1.

[148] EPA, AWQC METHODOLOGY, *supra* note 141, at 4-24 to 4-28. Note that these figures do not represent total fish intake, but rather intake of "freshwater" and "estuarine" species only ("marine" species are excluded; salmon are deemed to be "marine," so excluded). Note further that these figures represent per capita rates, i.e., rates for fish consumers and non-consumers alike, according to the 1994-96 Continuing Survey of Food Intake by Individuals. *Id.* Thus, while total fish intake by the general U.S. population, and by fish consumers within that population, is indeed greater than these figures suggest, these

As Table 1 shows, contemporary tribal intake is greater at every point of comparison.[149]

Table 1

Surveyed Population	Fish Consumption at Descriptive Percentiles (grams/day)					
	Mean	50th	90th	95th	99th	Maximum
CRITFC Tribes	63	40	113	176	389	972
Squaxin Island Tribe	73	43	193	247	--	--
Tulalip Tribe	72	45	186	244	312	--
Suquamish Tribe	214	132	489	796	--	1453
Lummi Nation	383	314	800	918	--	--

C. Past and Future

For the tribes, the past informs the future. Historical, original, or "heritage" rates have ongoing relevance for the fishing tribes. This is so given that the treaty guarantees are in perpetuity, given that the tribes in

numbers are used here because these are the values that EPA enlists for regulatory purposes.

[149] Table 1 reflects the summary statistics reported by four recent surveys of contemporary tribal fish consumption. *See*, CRTIFC, FISH CONSUMPTION SURVEY *supra* note 11; TULALIP AND SQUAXIN ISLAND FISH CONSUMPTION SURVEY, *supra* note 12; SUQUAMISH TRIBE, FISH CONSUMPTION SURVEY, *supra* note 13; and LUMMI NATION SEAFOOD CONSUMPTION STUDY, *supra* note 15. These statistics in some cases represent conversions from data originally expressed in grams of fish intake/kilogram of bodyweight/day; such conversions necessarily involve a number of judgments and assumptions. As such, this Table enlists the statistics as they have been reported in a number of recent governmental publications, namely, by the Lummi Nation, the Oregon Department of Environmental Quality, and the Washington State Department of Ecology. LUMMI NATION SEAFOOD CONSUMPTION STUDY *supra* note 15, at 57; OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, HUMAN HEALTH FOCUS GROUP REPORT, OREGON FISH CONSUMPTION RATE PROJECT 28 (June, 2008) [hereinafter ODEQ, HHFG REPORT]; and WASHINGTON DEPARTMENT OF ECOLOGY, FISH CONSUMPTION RATES TECHNICAL SUPPORT DOCUMENT 6 (Sept. 2011) *available at* https://fortress.wa.gov/ecy/publications/summarypages/1109050.html (last visited Apr. 20, 2013) [hereinafter ECOLOGY, FCR TSD]. The exceptions are the maximum values, which were not reported in these publications, but the Suquamish value is available at SUQUAMISH TRIBE, FISH CONSUMPTION SURVEY, *supra* note 13, at 11, 25, 71 (my calculations, based on maximum individual rate, in g/kg/day; mean bodyweights for men and women, and percentage of male and female respondents); the CRTIFC value is available at CRTIFC, FISH CONSUMPTION SURVEY, *supra* note 11, at 29.

fact seek to resume fish consumption practices and rates consonant with the treaty guarantees, and given that the tribes envision a future in which ecosystems that support the fish are restored. Thus, for example, the Umatilla tribe looked to "original consumption rates along the Columbia River and its major tributaries" in developing a fish consumption rate for environmental regulatory purposes "because that is the rate that the Treaty of 1855 is designed to protect and which is upheld by case law. It also reflects tribal fish restoration goals and healthy lifestyle goals."[150] Relatedly, recent surveys of Swinomish tribal members showed that they sought to reinvigorate more robust fish consumption practices and to increase their fish intake.[151]

To this end, tribal staff and their colleagues in academia and government have developed methods for creating tribal exposure scenarios, for use in environmental standard setting and other contexts. As Barbara Harper, Anna Harding, Stuart Harris and Patricia Berger explain, "[w]hile contemporary tribal resource use is often higher than in non-native communities, resource uses would be even higher under baseline conditions, (i.e., in the absence of resource degradation and contamination)."[152] Therefore, the method set forth is for tribal-specific exposure scenarios that are "not necessarily intended to capture contemporary resource patterns, but to describe how the resources were used before contamination or degradation, and will be used once again in fully traditional ways after cleanup and restoration."[153]

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[150] STUART G. HARRIS & BARBARA L. HARPER, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, EXPOSURE SCENARIO FOR CTUIR TRADITIONAL SUBSISTENCE LIFEWAYS app. 3 (2004).

[151] JAMIE DONATUTO, WHEN SEAFOOD FEEDS THE SPIRIT YET POISONS THE BODY: DEVELOPING HEALTH INDICATORS FOR RISK ASSESSMENT IN A NATIVE AMERICAN FISHING COMMUNITY, 85-89 (Ph.D. dissertation, University of British Columbia 2008) (summarizing survey of Swinomish Indian Tribal Community members, finding multiple causes of suppressed consumption, and finding that 73% of respondents stated that they would like to eat more fish than they do now). *Accord* Donatuto & Harper, *supra* note 14, at 150 (using the term "heritage" rates and describing the relevance of past consumption practices for future consumption practices for the fishing tribes).

[152] Barbara Harper, et al., *Subsistence Exposure Scenarios for Tribal Applications*, 18 HUMAN & ECOLOGICAL RISK ASSESSMENT 810, 811 (2012) [hereinafter, Harper, et al., *Subsistence Exposure Scenarios*].

[153] *Id.* at 810.

In fact, the forward-looking nature of the regulatory decisions to which a FCR is relevant (e.g., determinations of future uses of contaminated sites, restoration of waters to unimpaired, "fishable" status), makes the matter of tribes' future aspirations vital. As Jamie Donatuto and Barbara Harper have pointed out, fish consumption surveys are conducted in order to answer a question posed. The national survey that is the basis for the 6.5 g/day figure currently used in Washington's water quality standards, for example, was conducted in order to gain a picture of then-current consumer dietary preferences for marketing purposes. Conducted in 1973-74, it produced a snapshot of fish intake across the general U.S. population as part of its answer to this question. But ought this number be taken as a level of consumption to which we in the Pacific Northwest aspire in the future? Given the manner in which ambient water quality standards get set by environmental agencies, the implicit answer these agencies give is "yes." The next Part provides background on this standard-setting process under the Clean Water Act. This background will enable the critique of this implicit answer, as well as other bases for criticism of how this process affects tribes' rights and interests, in Parts VI and VII.

V. THE CLEAN WATER ACT'S ASPIRATION FOR FISHABLE WATERS

At the time the federal Clean Water Act was passed, there was a recognition that we had allowed our lifeblood to become contaminated, and an aspiration to return our nation's waters to a more healthful state. So the CWA included instructions to "restore" the "integrity" of our waters and to judge our efforts by whether our waters could sustain ordinary, necessary, even cherished human activities: Are they swimmable? Are they fishable? These instructions reflected a hopeful, future orientation.

This Part first describes the potential for achieving healthy aquatic ecosystems under the CWA and considers how the Act's ambient water quality standards provisions aim to ensure that our waters are fishable. It then discusses the particular role of human health criteria in developing water quality standards under the Act, and outlines EPA's current guidance in this respect.

A. The Potential for Healthy Aquatic Ecosystems under the CWA

The Clean Water Act is an imperfect environmental law and it has failed – now, forty years on – to deliver on even its promises. As a consequence, the salmon and other fish are depleted and contaminated, and their waters an unfit home. Yet, the CWA permits, and often requires, better results. This is so on its face and on current interpretations by EPA and the courts. Several features of the Act are holistic in approach and ambitious in scope. And several features together ought to facilitate respect for tribal rights and interests, given the explicit embrace of tribal self-government in managing tribal resources and given the EPA's trust-imbued responsibility for overseeing the whole.

First, the CWA sets forth as its goal nothing less than "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[154] The CWA stands apart for its holistic vision. Indeed, Robert Adler argues that "in the opening sentence of the federal Clean Water Act, Congress articulated one of the broadest whole ecosystem restoration and protection aspirations in all of environmental law."[155] Although to date there has been less attention devoted to the "physical" and "biological" components of this whole, this need not be the case.[156]

Second, the CWA establishes a federal structure that embraces a measure of tribal innovation and permits attention to aquatic ecosystems' interjurisdictional realities. For water quality-based standards, the CWA sets a sort of federal floor, but permits states and tribes to depart from this

[154] Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251(a) (2012).
[155] Robert W. Adler, *The Two Lost Books in the Water Quality Trilogy: The Elusive Objectives of Physical and Biological Integrity*, 33 ENVTL L. 29, 29 (2003). Note that the Spokane Tribe enlarges upon this holistic vision, adding "cultural integrity" to its conceptualization of the objectives of its surface water quality standards. Spokane Tribe of Indians, Surface Water Quality Standards, RESOLUTION 2010-173, § 1(3) (Feb. 25, 2010) ("The purposes of these water quality standards are**:** to restore, maintain and protect the chemical, physical, biological, and cultural integrity of the surface waters of the Spokane Indian Reservation …").
[156] Adler, *supra* note 155. Professor Adler argues that the CWA's holistic vision and understanding remains as its "guiding star" and observes that courts have suggested that it isn't mere rhetoric. *Id.* at n.5 and accompanying text (citing cases).

floor, so long as their standards are at least as protective. Water quality standards are comprised of goals, articulated in the form of "uses" envisioned for each water body, and "water quality criteria," i.e., requirements designed to ensure that the uses are attained.[157] The CWA sets forth a national goal of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water."[158] The EPA has interpreted this goal to require a baseline "use" of "fishable/swimmable" waters.[159] Authorized states and tribes, however, may identify other more protective designated uses for the various water segments within their respective jurisdictions.[160] Tribes, in particular, have been innovative in going beyond the default use designation in order to articulate their respective understandings of their relationship with the waters and the consequent imperative to protect these waters from assault.[161] Thus, for example, the Isleta Pueblo includes among its designated uses "primary contact ceremonial" use, which, it explains, involves "immersion, and intentional or incidental ingestion of water and it requires protection of sensitive and valuable aquatic life and riparian habitat."[162] The Spokane Tribe similarly includes a "primary contact ceremonial and spiritual" use and adds a separate "cultural" use.[163]

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[157] 33 U.S.C. § 1313(c)(2)(A). The EPA's water quality standards regulation describes water quality standards as being comprised of four parts: designated uses, water quality criteria, an antidegradation policy, and implementation policies. 40 C.F.R. § 131.10 - 131.13 (2012).

[158] 33 U.S.C. § 1251(a)(2).

[159] 40 C.F.R. § 131.2, § 131.4 (unless a state or tribe demonstrates that this use is not attainable, by means of a "use attainability analysis" pursuant to 40 C.F.R. § 131.10(j)).

[160] 40 C.F.R. § 131.2.

[161] Note that tolerance for tribal "innovation" is limited, among other things to innovations within the framework of the CWA and approvable by the EPA. For a critical discussion of the limitations imposed by the TAS model, *see, e.g.,* Darren J. Ranco, *Models of Tribal Environmental Regulation: In Pursuit of a Culturally Relevant Form of Tribal Sovereignty*, 56 FED. LAW. 46 (Mar./Apr. 2009).

[162] Pueblo of Isleta, Surface Water Quality Standards §IV.D, ADOPTED TRIBAL RESOLUTION 92-14 (Jan. 24, 1992), AMENDED TRIBAL RESOLUTION 02-064 (Mar. 18, 2002).

[163] Spokane Tribe of Indians, Surface Water Quality Standards, RESOLUTION 2010-173 § 9(b)(i) and (ii) (Feb. 25, 2010). Cultural use is defined broadly to mean "the use of waters to support and maintain the way of life of the Spokane Tribal People, including, but not limited to: use for instream flow, habitat for fisheries and wildlife, and preservation of habitat for berries, roots, medicines and other vegetation significant to the values of the

Crucially, the CWA recognizes that aquatic ecosystems are fluid: contaminants move, waters move, sediments move, aquatic creatures move. The Act and EPA's implementing regulations thus include several provisions designed to address this ecological reality. Each state and tribe is directed to "consider" downstream uses and "ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters when designating their own uses."[164] EPA may veto issuance of a discharge permit by a state or tribe given its impact on the waters of another state or tribe,[165] and a federal permit may be denied if EPA determines that it would result in the violation of state or tribal water quality standards.[166]

Third, the CWA appreciates that the most sensitive receptors in a water body will sometimes be aquatic life and sometimes be human life, and that different "uses" will require differing degrees of protection if they are to be assured. So, EPA requires that water quality standards be set to "support the most sensitive use" where a water body is designated for more than one use.[167]

Fourth, the CWA envisions frequent updates to state and tribal water quality standards, directing them at least every three years to review and, as appropriate, revise their water quality standards.[168] Congress' distaste for delay was made known during debate surrounding the 1987

Spokane Tribal People." *Id.* at § 2. The Spokane Tribe, like other fishing tribes, also lists "fish and shellfish" among its uses, making explicit that this includes "migration, rearing, spawning, and harvesting" for salmonid and other fish and shellfish species. *Id.* at § 9(b)(v).

[164] 40 C.F.R. § 131.10(b).

[165] 33 U.S.C. § 1342(b) and (d) (2012).

[166] 33 U.S.C. § 1341(a); *see* Arkansas v. Oklahoma, 503 U.S. 91 (1992) (upholding EPA's interpretation that CWA § 401(a)(2) prohibits the issuance of a permit unless compliance with the relevant state water quality standards can be assured, but stating that whether state standards would be complied with is a matter for EPA interpretation, not the state's interpretation of its own standards).

[167] 40 C.F.R. § 131.11(a).

[168] 33 U.S.C. § 1313(c)(1). The Act describes the touchstone for state and tribal efforts to this end in sweeping terms: "[s]uch standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2).

amendments;[169] the CWA therefore now includes a host of mechanisms such as benchmarks and hammers to ensure timely progress. Thus, states and tribes are to submit any revised or new water quality standard to the EPA, which is given a short timeline for action: EPA must approve it within 60 days or disapprove it within 90 days.[170] If the latter, EPA must indicate to the state or tribe the changes to be made in order to meet the requirements of the CWA. If the state does not make these changes within 90 days, the EPA must promulgate water quality standards for that state's or tribe's waters.[171]

Fifth, the CWA charges the EPA – a federal trustee – with the overarching responsibility to ensure that the purposes of the CWA are met. Among other things, it stipulates that the EPA itself "shall promptly" promulgate water quality standards "in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of [the CWA]."[172]

In practice, however, the CWA's potential is often not realized. As elsewhere in environmental law, the whole gets fractured into parts, with ecosystems and watersheds addressed in pieces, delineated by program, source, and chemical. Thus the following discussion – like current debates in Washington and elsewhere in the Pacific Northwest – focuses on efforts to protect the waters and all those that depend on a well-functioning aquatic ecosystem by means of water quality standards and, more specifically, human health criteria. The next section provides background for considering how the human health criteria function to permit degradation to the point that fish are unfit for human consumption and so to permit impairment of tribes' rights to take fish.

[169] *See, e.g.,* EPA, National Toxics Rule, *supra* note 18, 57 Fed. Reg. at 60,849 ("The critical importance of controlling toxic pollutants has been recognized by Congress and is reflected, in part, by the addition of section 303(c)(2)(B) to the Act. Congressional impatience with the pace of State toxics control programs is well documented in the legislative history of the 1987 amendments.").
[170] 33 U.S.C. § 1313(c)(2) and (3).
[171] 33 U.S.C. § 1313(c)(3) and (4).
[172] 33 U.S.C. § 1313(c)(4).

B. Water Quality Standards and Human Health Criteria

As noted above, the CWA assigns to states and tribes the primary responsibility for establishing water quality standards. The Act nonetheless envisions a prominent role for EPA in its scheme of ambient water quality-based regulation. Thus, while states and tribes are meant to determine their respective beneficial uses and adopt criteria to support those uses, the EPA is involved in and influences this process in several ways. Among other things, EPA is tasked with providing the latest scientific information about the nature and extent of toxic contaminants and their impact on human and aquatic ecosystem health.[173] EPA is also charged with overseeing states' and tribes' promulgation of WQS, with the responsibility to approve or disapprove WQS and, potentially, to step in and promulgate WQS for a state or tribe that fails to rectify deficiencies identified by the EPA, as outlined above. And EPA always has the authority and the obligation, under the "hammer" provision of CWA § 303(c)(4), to promulgate water quality standards "in any case" that this turns out to be "necessary to meet the requirements of [the CWA]."[174]

EPA has issued guidance that is to inform efforts, whether by states and tribes or by the EPA itself, to set or approve human health criteria for use in WQS.[175] EPA's most recent version of this guidance, its *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*, was published in 2000.[176] This guidance presumes a risk-based approach; thus contaminant levels to be permitted by environmental standards are set according to the "risk" or "hazard" posed to exposed humans. Water quality criteria are derived chemical by chemical: a substance's toxicity is multiplied by an individual's exposure

[173] 33 U.S.C. § 1314. Such scientific information issued by EPA is, confusingly, also called "criteria."
[174] 33 U.S.C. § 1313(c)(4).
[175] The EPA notes that this guidance document is intended solely to describe EPA methods and to provide guidance to states and tribes; it is not legally binding. EPA, AWQC METHODOLOGY, *supra* note 141, at ii (stating that "[t]his guidance does not substitute for the Clean Water Act or EPA's regulations; nor is it a regulation itself. Thus, it does not impose legally-binding requirements on EPA, States, Tribes or the regulated community, and may not apply to a particular situation based upon the circumstances.").
[176] EPA, AWQC METHODOLOGY, *supra* note 141.

to that substance via the aquatic environment. Recall that fish intake is the primary means by which humans are exposed to a host of toxicants. An assessment of an individual's exposure, therefore, turns importantly on an estimate of the rate of fish consumption. As the sample risk assessment equation[177] below illustrates, other parameters, such as how long a particular rate of intake is sustained (i.e., exposure duration), also factor into an assessment of exposure.

$$\text{Risk} = \text{Toxicity} \times \frac{(\text{Contaminant Concentration})(\text{Bioconcentration Factor})(\text{FCR})(\text{Exposure Duration})}{(\text{Bodyweight})}$$

In its updated 2000 guidance, EPA replaced its former recommended default FCR – which had been 6.5 g/day – with a new four-part hierarchy of preferences.[178] EPA now recommends that states and tribes base their criteria, first, on local data regarding fish consumption practices; second, on data reflecting similar geography or population groups; third, on states' or tribes' own analysis of national data; and, last, on the EPA's national default values.[179] The EPA's guidance includes updated national default FCRs: 17.5 g/day for the general population, and 142.4 g/day for "subsistence" fishers. These national defaults reflect, respectively, the 90th and 99th percentile values for freshwater and estuarine species only (i.e., not marine species), for fish consumers and non-consumers alike from a national survey of fish consumption conducted by the U.S. Department of Agriculture in 1994-96.[180] The EPA

[177] This is a simplified version of the equation used to calculate risk-based water quality standards and surface water cleanup standards for carcinogens. To determine the level of each contaminant that may permissibly be discharged to or remain in the environment, agencies assume a certain level of "risk" (e.g., 1 in 1,000,000) and solve for "contaminant concentration." Agencies enlist contaminant-specific values for "toxicity" (describing how potent a carcinogen each is) and for "bioconcentration factor" (describing the degree to which each contaminant bioconcentrates in fish tissue). This simplified equation omits the conversion factors, which ensure a result in the appropriate units. This simplified equation also omits any "diet fraction," or "site use factor," two controversial concepts sometimes applied by agencies that are discussed further in Part VI. It should be noted here, however, that both of these concepts are fractional values applied to the numerator of this equation, with the consequence that estimates of exposure, and therefore risk, are decreased.

[178] EPA, AWQC METHODOLOGY, *supra* note 141, at 4-24 to 4-28.

[179] *Id.*

[180] *Id.* at 4-24 (referencing the Department of Agriculture's 1994-1996 Continuing Survey of Food Intake by Individuals (CSFII)). Note that these are "per capita" values; i.e., they

"strongly emphasizes," moreover, that states and tribes "should consider developing criteria to protect highly exposed population groups and use local or regional data over the default values as more representative of their target population group[s]."[181]

The EPA guidance also addresses the matter of "acceptable" levels of risk. EPA states that it views an excess cancer risk level of 1 in 1,000,000 to be an appropriate basis for regulating water quality (that is, standards are to be set to ensure that the risk from toxic contaminants does not exceed this level for the general population).[182] EPA further notes that it will use this risk level itself in promulgating any state or tribal standards.[183] EPA suggests, however, that it will approve states' or tribes' water quality standards that are either more protective or less protective of human health, and allow risks as high as (but not to exceed) 1 in 10,000 for "highly-exposed populations."[184] EPA adds a number of caveats to this suggestion, notably the point that it is not "advocating" that states and tribes permit risks this great to affected highly-exposed populations.[185]

Water quality standards are a linchpin for numerous regulatory efforts. Within the CWA, they provide the basis for setting limits on discharges to waters from individual sources under the National Pollutant Discharge Elimination System (NPDES); [186] and they serve as a touchstone for identifying "impaired waters," which identification in turn supports the development of "total maximum daily loads" (TMDLs).[187] Their reach extends beyond the CWA as well: among other things, federally licensed projects must be "certified" as having met their

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are taken from a dataset that reflects fish consumers and non-consumers alike. These figures reflect only freshwater and estuarine species; they exclude marine species, and define salmon as a marine species. If marine species were to be included, the (per capita) 90th percentile value would be 74.8 g/day and the 99th percentile value would be 215.7 g/day.

[181] *Id.* at 4-24 to 4-25.
[182] *Id.* at 2-6.
[183] *Id.*
[184] *Id.* at 2-6 to 2-7.
[185] *Id.* at 2-6.
[186] 33 U.S.C. § 1342 (2012).
[187] 33 U.S.C. § 1313(d).

requirements; [188] and they constitute "Applicable or Relevant and Appropriate Requirements (ARARs)" for federal "Superfund" cleanups.[189]

The next Part considers how Washington (and, to a lesser extent, other states in the Pacific Northwest) has performed its role in the Clean Water Act's statutory scheme. Specifically, it reflects upon efforts to ensure that water quality standards, and the FCR upon which they are premised, are appropriate to circumstances in the Pacific Northwest.

VI. WATER QUALITY STANDARDS: EXPERIENCE IN THE PACIFIC NORTHWEST

Efforts by Washington and other states in the Pacific Northwest have worked to undermine tribes' treaty-secured rights and have fallen woefully short of the CWA's aspirations. Although regulated industries tend to be the engines of underperformance here,[190] the states and EPA have often been complicit – contrary to their responsibilities. Several strategies and arguments have emerged as features of states' recent efforts to update their water quality standards and the FCR upon which these are based. Revisions that would include an updated and more protective FCR have been delayed; the scientific studies that support an increased FCR have been denigrated; the impact of an increased FCR has sought to be diluted by introducing various regulatory devices such as "diet fractions," and "site use factors;" the scientific facts about species' behaviors and sources of contamination have sometimes been distorted; and the identifiability of those affected – the fact that we know precisely who it is that would be impacted by tolerating a greater amount of risk – has been denied. These strategies and arguments are in many respects

[188] 33 U.S.C. § 1341(a)(1) ("Any applicant for a Federal license or permit to conduct any activity … which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate … that any such discharge will comply with the applicable provisions of [*inter alia*] section 1313 … of this title.").

[189] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9621(d) (2012).

[190] *See, e.g.,* Robert McClure, *Business Interests Trump Health Concerns in Fish Consumption Fight*, INVESTIGATE WEST (Mar. 30, 2013), *available at* http://www.invw.org/article/business-interests-trump-1344 (last visited Apr. 20, 2013) (documenting industry's "intense lobbying campaign" to delay and dilute Washington's standards through e-mails obtained under the Washington Public Records Law).

familiar; they have been enlisted toward anti-regulatory ends in other contexts.

In fact, what is remarkable is that things have not been more different here, given the tribal context that permeates environmental decision making in the Pacific Northwest. That is to say, the tribal context for state and federal agency decisions here has often not been visible. Tribes' unique political and legal status has frequently gone unnoticed or been misunderstood by the various participants in the debate. And tribal treaty-secured and other rights have been given short shrift.

Yet tribes, for their part, have been active and vocal throughout the various states' processes. Tribes, importantly, have conducted many of the relevant scientific studies – the primary research vital to states' water quality standards under EPA guidance directing that states prefer data of local fish consumption practices. In addition, tribal staff have offered their technical expertise through informal and formal agency channels.[191] And tribal leaders have worked with leaders in state and federal governments.[192]

This Part describes experience with the WQS process in the states of the Pacific Northwest, with a focus on Washington.[193] It highlights the features of the process that have contributed to its failure to produce more protective WQS, despite the passage of nearly two decades since the requisite data were published. It is not an exhaustive chronology, but

[191] *See, e.g.,* Washington State Department of Ecology, Toxics Cleanup Program, "MTCA Rule Revision and MTCA/SMS Integration: List of Participants," *available at* http://www.ecy.wa.gov/programs/tcp/regs/2009MTCA/Contacts.html (last visited Apr. 20, 2013) (listing tribal staff among relevant advisory group and workgroup participants). *See also* various tribes' public comments on Ecology's Fish Consumption Rate Technical Support Document and on Ecology's various sediments and water quality standards rulemaking efforts, which can be accessed via the docket cited *infra* note 193.
[192] *See, e.g.,* WASHINGTON GOVERNOR'S OFFICE OF INDIAN AFFAIRS, *supra* note 88.
[193] All public comments entered into the docket for the various facets of the process in Washington, including Ecology's two versions of its Fish Consumption Rates Technical Support Document and its proposed and final Sediment Management Standards rule, are *available at* http://www.ecy.wa.gov/toxics/fish.html (last visited Apr. 20, 2013).

rather a selective account of the arguments and developments that have shaped a disappointing effort with, to date, inadequate results.

A. Delay

Nearly two decades have passed since the CRTIFC study was published, while state water quality standards in the Pacific Northwest have remained largely unchanged. Oregon is the recent exception, having increased its FCR to 175 g/day in 2011.[194] Washington, Idaho, and Alaska all continue to be governed by water quality standards premised on an estimate of fish intake at 6.5 g/day.

Once Oregon embarked on the task, it took twelve years and two attempts to get to its current standard, which embraces a 175 g/day FCR. Oregon set out in 1999 to revise its WQS, which at that point were based on the former national default of 6.5 g/day.[195] In its first attempt, the Oregon Department of Environmental Quality (ODEQ) constituted a Technical Advisory Committee, which endorsed the use of values from the CRITFC survey and formally recommended that ODEQ adopt standards that included three FCRs, to be applied based on the intensity of fishing activity in the relevant waters: 17.5 g/day, 142.4 g/day, and 389 g/day. The highest of these numbers corresponds to the 99th percentile value from the CRITFC survey. ODEQ, however, rejected this recommendation, opting instead to promulgate a standard with a statewide FCR of 17.5 g/day. Oregon finalized its revised WQS based on this number in May of 2004. The EPA, however, declined to approve or disapprove Oregon's WQS within the statutorily mandated deadlines. Both Oregon's decision and EPA's inaction were sharply criticized by the affected tribes.[196]

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[194] Oregon Department of Environmental Quality, Water Quality Standards for Toxic Pollutants, *available at* http://www.deq.state.or.us/wq/standards/toxics.htm (last visited Apr. 20, 2013).
[195] Martin S. Fitzpatrick, *Changes in Oregon's Water Quality Standards for Toxics*, 20 J. ENVTL. L. & LITIG. 71, 75, 79 (2005).
[196] *See* Memorandum from Stephanie Hallock, DEQ, Ron Kreizenbeck, EPA, and Antone C. Minthorn, Confederated Tribes of the Umatilla Indian Reservation, to Oregon Environmental Quality Council (Oct. 2, 2006), *available at* http://www.deq.state.or.us/about/eqc/agendas/attachments/2006oct/B-

Environmental groups, too, registered their concern, and sued EPA for its failure to act as required by the CWA.[197] EPA ultimately disapproved these WQS on June 1, 2010.[198]

In the meantime, Oregon was persuaded to go back to the drawing board, this time with a tri-governmental process led by the Umatilla tribe, the EPA, and Oregon. This process involved over a year of public meetings and enlisted a cadre of independent experts, the Human Health Focus Group, convened to assess the scientific defensibility and applicability of the available fish consumption studies, including the CRITFC, Squaxin Island and Tulalip, and Suquamish surveys.[199] Finally, WQS based on a 175 g/day FCR were adopted in Oregon on June 16, 2010, and approved by EPA on October 17, 2011.[200]

Idaho is taking a similarly tortuous path to what one hopes will be more protective standards. Idaho didn't begin the process of revising its WQS until April of 2005.[201] Idaho Department of Environmental Quality (IDEQ) adopted revised WQS based on a 17.5 g/day default fish consumption rate in November of 2005; the Idaho legislature approved these standards in March of 2006.[202] The WQS were submitted to EPA on

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FishConsumptionRate.pdf (last visited Apr. 20, 2013) (describing criticism from tribes and setting forth a "path forward").

[197] *See* Letter from Michael A. Bussell, Director, Office of Water and Watersheds, EPA Region X, to Neil Mullane, Administrator, Water Quality Division, Oregon Department of Environmental Quality (June 1, 2010), *available at* http://www.epa.gov/region10/pdf/water/oregon-hhwqc-tsd-letter_june2010.pdf (last visited Apr. 20, 2013) (issuing disapproval and noting that this met the deadline for EPA action set forth by the district court in its consent decree resolving Northwest Environmental Advocates v. EPA, N. 06-479-HA (D. Or. 2006)).

[198] Oregon Department of Environmental Quality, Water Quality Standards for Toxic Pollutants, *available at* http://www.deq.state.or.us/wq/standards/toxics.htm (last visited Apr. 20, 2013).

[199] Oregon Department of Environmental Quality, Fish Consumption Rate Project (2006-2008), *available at* http://www.deq.state.or.us/wq/standards/humanhealthrule.htm#fish (last visited Apr. 20, 2013).

[200] Oregon Department of Environmental Quality, Water Quality Standards for Toxic Pollutants, *supra* note 198.

[201] *See* Letter from Mike Bussell, Director, Office of Water, EPA Region X, to Barry Burnell, Water Quality Division Administrator, Idaho Department of Environmental Quality (May 10, 2012), *available at* http://www.deq.idaho.gov/media/854335-epa-disapproval-letter-human-health-criteria-051012.pdf (last visited Apr. 20, 2013).

[202] *Id.* at 1-2.

July 7, 2006.[203] Here again, EPA had to be threatened with a suit under the CWA.[204] Finally, in May of 2012, EPA disapproved Idaho's WQS, noting the availability of relevant local and regional fish consumption surveys documenting greater consumption rates and stating that "EPA cannot ensure that the criteria derived based on a fish consumption rate of 17.5 g/day are based on a sound scientific rationale consistent with [EPA's water quality standards regulation] and protect Idaho's designated uses."[205] Once disapproved, IDEQ began anew, this time with EPA's assistance.[206] Among other things, it appears that Idaho's second round of process will include conducting a new fish consumption survey.[207]

Washington, throughout this time, opted to wait and "observe[]" and learn from the Oregon process.[208] Yet, the Washington State Department of Ecology (Ecology) had years ago recognized the need to update its FCRs based on more recent consumption data and had published an

[203] *Id.* at 2.
[204] *See* Environmental Protection Agency, Facilitation Support for Water Quality Standards Fish Consumption Joint Fact Finding Stakeholder Consultation Process 1 (Sept. 4, 2012) (noting that the Idaho Conservation League had filed a notice of intent to sue the EPA for failing to exercise its mandatory duty under the CWA to act on Idaho's 2006 water quality submittal).
[205] Letter from Mike Bussell, Director, Office of Water, EPA Region X, to Barry Burnell, Water Quality Division Administrator, Idaho Department of Environmental Quality, *supra* note 201, at 3.
[206] *See* Letter from Barry Burnell, Water Quality Division Administrator, Idaho Department of Environmental Quality, to Mike Bussell, Director, Office of Water, EPA Region X (Aug. 6, 2012), *available at* http://www.deq.idaho.gov/media/878428-deq-response-letter-human-health-criteria-080612.pdf (last visited Apr. 20, 2013); *see generally*, Idaho Department of Environmental Quality, Water Quality: Docket No. 58-0102-12101-Negotiated Rulemaking, *available at* http://www.deq.idaho.gov/58-0102-1201 (last visited Apr. 20, 2013).
[207] Letter from Barry Burnell, Water Quality Division Administrator, Idaho Department of Environmental Quality, to Mike Bussell, Director, Office of Water, EPA Region X, *supra* note 206; *see also,* Idaho Department of Environmental Quality, PowerPoint Slides "Fish Consumption Rates in Human Health Criteria," Slide 12 (Nov. 28, 2012), *available at* http://www.deq.idaho.gov/media/926157-fish-consumption-rates-human-health-criteria-meeting-presentation-112812.pdf (last visited Apr. 20, 2013) ("DEQ has decided to pursue a fish consumption survey to collect new, Idaho-specific data").
[208] *See, e.g.,* Oregon Fish Consumption Rate Project Workgroup One, Mar. 13, 2007, Facilitator's Meeting Summary at 10, 14 (noting presence of Washington State Department of Ecology representative Cheryl Neimi and quoting her remarks).

analysis of the available tribal studies as early as 1999.[209] Various commitments had been made by Ecology leadership that revisions to Washington's FCR and WQS were necessary and would be expeditiously undertaken.[210] But Washington only formally embarked on revisions after its triennial review in 2010.[211] Since that time, its process has been fraught with reversals of course and more delay.

Washington's effort has proceeded along several fronts.[212] First, Ecology developed a *Fish Consumption Rates Technical Support Document* (FCR TSD) intended initially to assess the relevant fish consumption survey data and recommend a range within which a scientifically defensible FCR would fall.[213] Second, Ecology undertook rulemaking on Sediment Management Standards (SMS), addressing cleanup of toxic contaminants that affect this component of the aquatic environment. As originally envisioned, the SMS would be the first place in which a more protective FCR would be established in agency regulation. Third, Ecology announced that it would commence rulemaking on WQS, but that it would do so in two steps. It would first craft the "off ramps" to the more protective standards it anticipated, that is, it would develop "implementation tools" in the form of more lenient compliance schedules

[209] In 1999 Ecology published a draft document, which it never finalized, that analyzed the CRITFC and Tulalip/Squaxin Island data as part of its review of the then-current science for use in its risk-based water quality and cleanup standards. LESLIE KEILL & LON KISSINGER, WASHINGTON STATE DEPARTMENT OF ECOLOGY, ANALYSIS AND SELECTION OF FISH CONSUMPTION RATES FOR WASHINGTON STATE RISK ASSESSMENTS AND RISK-BASED STANDARDS (Draft, 1999).

[210] *See, e.g.,* Letter from Michael Grayum, Executive Director, Northwest Indian Fisheries Commission, to Dennis McLerran, Regional Administrator, EPA Region X (Aug. 24, 2012) (noting commitments by current and previous Ecology Directors to tribes that revisions to WQS including a more protective FCR would be completed by the end of the Gregoire administration).

[211] Washington State Department of Ecology, "Triennial Review Process for Surface Water Quality Standards," *available at* http://www.ecy.wa.gov/programs/wq/swqs/triennial_review.html (last visited Apr. 20, 2013).

[212] Letter from Michael Grayum, Executive Director, Northwest Indian Fisheries Commission, to Dennis McLerran, Regional Administrator, EPA Region X, *supra* note 210; *see also,* Washington State Department of Ecology, "Reducing Toxics in Fish, Sediments, and Water," *available at* http://www.ecy.wa.gov/toxics/fish.html (last visited Apr. 20, 2013).

[213] ECOLOGY, FCR TSD, *supra* note 149, at 103.

and the like. Ecology would then turn to the substantive standards, the human health criteria for toxic contaminants, which would set forth a FCR and other parameters in the equation for assessing risk to humans. The FCR TSD, initially published in September, 2011, "concluded that available scientific studies support the use of a default fish consumption rate in the range of 157 to 267 grams per day (g/day);"[214] this document was slated for publication in early 2012, after a round of public meetings and comments. The SMS rulemaking was expected to result in a final rule incorporating a more protective default FCR by the end of then-Governor Gregoire's term, in early 2013.

In July of 2012, however, Ecology abruptly announced a change of course, back-pedaling on both the timing and the substance of its efforts.[215] First, Ecology announced that it would expunge any statements about a recommended FCR from its TSD.[216] Second, Ecology stated that it would exclude a statewide default FCR from its SMS rule.[217] Third, Ecology set forth a revised schedule, under which both the TSD and SMS rule would be delayed.[218] While Ecology attempted to cast this schedule as "accelerating" its work on the substantive WQS, these standards – now the first place that an updated FCR is to be promulgated in agency rulemaking – still occupy fourth (i.e., last) position in the queue, and are not expected to be completed until spring of 2014.[219]

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[214] *Id.* at 7.
[215] Letter from Ted Sturdevant, Director, Department of Ecology, to Interested Persons (July 16, 2012) [hereinafter "Sturdevant, Change of Course Announcement"].
[216] *Id.*
[217] *Id.* Rather, the fish consumption rate to be used is to be determined anew at each site.
[218] *Id.*
[219] *Id.* Letter from Ted Sturdevant, Director, Washington State Department of Ecology, to Dennis McLerran, Regional Administrator, U.S. Environmental Protection Agency Region X (Sept. 25, 2012) (speaking of "Ecology's work to revise our water quality standards," stating "[a]s you know, we have accelerated our timeline for this important work"). Ecology's change of course can be viewed as having accelerated the *start* date for agency work on the substantive water quality standards, which are now to be developed alongside the implementation tools, rather than being developed entirely after the implementation tools. But Ecology still anticipates that the *completion* date for the substantive WQS will come after all of the other three components of its effort have been completed. *See* Sturdevant, Change of Course Announcement, *supra* note 215 (providing new timeline for Ecology's various processes).

It is perhaps predictable that industry throughout this period sought not only to secure more lenient standards but also to postpone their applicability. Industry has enlisted several strategies to these ends;[220] those canvassed in this section focus on those strategies designed to delay. First, Ecology's curious cart-before-the-horse approach for its WQS is a creature of industry advocacy. Having approached the regulatory task in the opposite order in Oregon – that is, create the substantive standards first, then consider mechanisms such as compliance schedules to smooth implementation of the substantive standards – many of the same industries sought to better their lot in the Washington process.[221] Second, industry has called in several instances for "more study," including data that were redundant or irrelevant. Thus, industry has continued to seek additional fish consumption data, calling for new surveys of the state's general population[222] or for re-analysis of existing national data or other states' data.[223] Surveys are incredibly time-consuming, not to mention expensive, to conduct. Third, industry has

[220] *See, e.g.,* Association of Washington Business, Letter to Ted Sturdevant, Director, Washington State Department of Ecology 2, 4 (Apr. 19, 2012) [hereinafter AWB, April 2012 Letter] (questioning that Washington has an obligation under the CWA to update its current 6.5 g/day standards at all and "request[ing] that a default FCR not be incorporated in the SMS rule"); *accord* Northwest Pulp & Paper Association, Proposed Meeting Agenda for Ecology 2 (Feb. 12, 2012) (on file with author) (arguing against including a default FCR in the SMS rule, and urging site-by-site determinations instead).

[221] *See, e.g.,* Northwest Pulp & Paper Association, Letter to Becka Conklin, Washington State Department of Ecology (Dec. 17, 2010) (responding to Ecology's initiation of triennial review process under the CWA, and urging Washington to expand its "implementation tools" as a pre-condition to updating its FCR and its WQS); *accord* Letter from Michael Grayum, Executive Director, Northwest Indian Fisheries Commission, to Dennis McLerran, Regional Administrator, EPA Region X, *supra* note 210 (describing Ecology's sequencing of the various components of the SMS and WQS rulemakings).

[222] *See, e.g.,* Northwest Pulp & Paper Association, Proposed Meeting Agenda for Ecology, *supra* note 220, at 2 (arguing that "studies should be made available for the general FCR rates for the State of Washington," and reiterating that a "[g]eneral population survey is needed"); The Boeing Company, Comments on FCR TSD 2.0 2, 3-4 (Oct. 26, 2012) [hereinafter Boeing, FCR TSD 2.0 Comments] ("Critically, a fish consumption survey of Washington's general population has not been conducted. Ecology should conduct a state-wide fish consumption survey before finalizing the Technical Support Document and before undertaking the process of revising water quality standards, which will significantly impact the regulated community and the state economy.").

[223] Boeing, FCR TSD 2.0 Comments, *supra* note 222, at 16-17 (taking Ecology to task for frequently mentioning Oregon's analysis; suggesting that Ecology consider other states' FCRs; and commending Florida's probabilistic approach).

asked for information that is irrelevant to the particular regulatory tasks before Ecology, sometimes statutorily so. Under the CWA, for example, WQS are based solely on an assessment of the risks posed by toxic contaminants to be regulated and don't permit the statutory concern for human health to be "balanced" against costs or countervailing risks. Yet industry has argued that data on risk-risk tradeoffs or a cost-benefit analysis ought to be included in the FCR TSD.[224] Finally, and without a hint of irony, one industry commenter has buttressed its call for further study with the argument that the CRITFC and other tribal data *are now outdated*.[225]

Ecology has capitulated to many of these industry requests.[226] For example, Ecology circulated a "Version 2.0" of its TSD for another round of public comments,[227] in which it expanded its reanalysis of national fish

[224] *See, e.g.,* Northwest Pulp & Paper Association, Proposed Meeting Agenda for Ecology, *supra* note 220, at 2, 3 (stating that Ecology should expand its FCR TSD to include a discussion of "the relative benefits of consuming fish and shellfish" and arguing that "[i]f Ecology were to adopt the FCR rates proposed in the TSD, the state would be trying to regulate the contaminant concentrations in fish to much lower levels that are allowable in other foodstuffs, such as beef, chicken, pork and dairy products."); National Council for Air and Stream Improvement, Comments on FCR TSD (Jan. 11, 2012) (stating that "[a]ny decision to change the current default FCRs should be justified in terms of overall benefit to public health" and arguing that "[t]his assessment is imperative as there is currently no viable comparator for the costs that would be borne by both Ecology and the regulated community in responding to lowered sediment and water quality criteria as a result of increased FCRs. Without knowledge of what the benefit might be, it is impossible to determine if these costs would be justified.").

[225] J.R. Simplot Co., Comments on Ecology's FCR TSD 2.0 at 8, 12 (Oct. 26, 2012) (stating that "[t]he age of the CRITFC survey (1994) calls into question the applicability of these data with regards to current conditions.").

[226] Ecology's actions in this respect may themselves be a somewhat predictable response to incentives created by current models of agency accountability. According to Professor Wendy Wagner, the current administrative law system permits stakeholders with the requisite technical and legal resources to "inadvertently or deliberately exert substantial control over the agency's agenda in the number, diversity, detail, and even the framing of the multiple comments they lodge, as well as with the information they share earlier in the process," with the result that "[a]n enormous record of highly technical and sometimes extraneous comments … will tend to be reflected in the agency's own rule in order to avoid accusations of insufficient attention to detail." Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010).

[227] *See* AWB, April 2012 Letter, *supra* note 220, at 2 (asking Ecology to circulate its revised TSD for an additional, second "60-day public comment period"); and Washington State Department of Ecology, "Fish Consumption Rates Technical Support Document," *available at* http://www.ecy.wa.gov/programs/tcp/regs/fish/2012/FCR-doc.html (last

consumption data and added an appendix undertaking the requested risk-risk discussion. And while Washington has (so far) declined to wait while a study of the general statewide population is conducted – citing the commonsense point that the general population data would likely produce little new information of value, inasmuch as Ecology would still need to set standards protective of those most exposed[228] – Idaho has gone precisely this route.

EPA, for its part, has declined to hold states' feet to the fire in fulfilling their § 303(c)(1) and (2) obligations. In Oregon, EPA had to be sued before it discharged its statutory duty and disapproved Oregon's first round of standards. Rather than the 90-day period stipulated by the statute, EPA's disapproval took a little over six years. Notably, by declining to disapprove Oregon's lackluster standards, EPA avoided starting the second 90-day clock under § 303(c)(3) for it to step in and issue its own standards to be applied to Oregon waters.[229] In Idaho, EPA waited for just under six years before delivering its disapproval. Rather than issue its own standards for Idaho once ninety days had passed as required by the statute, however, EPA gave its blessing to a process in which it would "assist" Idaho in giving things another try. In Washington, EPA issued a fairly tepid response to Ecology's July 2012 announcement of its reversal of course.[230] While EPA called attention to its recent disapproval of Idaho's inadequate standards as "strong precedent for the current process in Washington," it offered its support for Ecology's

visited Apr. 20, 2013) (chronicling the sequence of drafts and public comment periods on the first and second versions of Ecology's FCR TSD).

[228] Ted Sturdevant, Director, Washington Department of Ecology, Testimony Before the Washington House Environment Committee, Work Session: Update on fish consumption rates and water quality standards (Nov. 30, 2012) *available at* http://tvw.org/index.php?option=com_tvwplayer&eventID=2012111039 (last visited Apr. 20, 2013) [hereinafter Sturdevant, House Testimony].

[229] 33 U.S.C. 1313(c)(3) (2012) ("If the Administrator determines that any such revised or new [water quality] standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes necessary to meet such requirements. If such changes are not adopted by the State within ninety days after notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection").

[230] Letter from Dennis J. McLerran, Regional Administrator, EPA Region X, to Ted Sturdevant, Director, Washington Department of Ecology (Sept. 6, 2012).

"commitment to commencing" revisions to its WQS.[231] EPA also noted that "[i]f and when there is regional or local data showing higher fish consumption rates, it needs to be utilized for derivation of the State's human health criteria" – but made no mention of the years that had already elapsed while such data had indeed been available, nor suggested any repercussions for Ecology's failure to respond to this data.[232] Nor has EPA much mentioned (let alone exercised) the hammer of its own § 303(c)(4) authority.

Across the Pacific Northwest, EPA has signaled to the states that it is willing to stand to the side and wait. Rather than take an assertive posture in the face of state recalcitrance, EPA has favored a more passive role. Speaking to tribal leaders in September, 2012, EPA Regional Administrator Dennis McLerran noted the years it had taken for Oregon to complete its standard, cited the heavy "political lift" ahead in Washington, Idaho and Alaska, and then stated: "it's a bit of a dance."[233]

B. Disparage

Throughout the process of updating the FCR in Washington, there have been broadsides on the science that supports increased rates. In the Pacific Northwest, the bulk of this scientific data has been produced by tribes and tribal consortia. As noted above, the CWA anticipates that scientific advances will trigger updates to states' and tribes' WQS and EPA's WQS regulation makes clear that the latest scientific knowledge is the touchstone for EPA review of state and tribal standards' compliance with the Act. Although the relevant surveys of tribal fish consumption were carefully conducted to ensure their scientific defensibility,[234] and have consistently been found to meet EPA's (and sister states') standards

[231] *Id.*
[232] *Id.*
[233] Columbia Basin Fish & Wildlife News Bulletin, "Fish Consumption Rate, Water Quality Standards: Should Idaho, Washington Follow Oregon's Lead?" (Sept. 27, 2012), *available at* http://www.cbbulletin.com/423011.aspx (last visited Apr. 20, 2013).
[234] *See, e.g.,* Letter from Babtist Paul Lumley, Executive Director, CRITFC, to Ted Sturdevant, Director, Washington State Department of Ecology (Mar. 19, 2012) (documenting at length the measures and protocols undertaken to ensure that the CRITFC fish consumption survey met the highest standards in the field).

in this regard, their validity has nonetheless continued to be challenged by industry and individuals.

Ecology's initial FCR TSD considered three studies of tribal fish consumption and one study of Asian and Pacific Islanders in King County, finding each of these four studies to be scientifically defensible. In its FCR TSD, Ecology developed a set of criteria to determine the technical defensibility of fish consumption survey data, to be used in assessing the data's relevance and appropriateness to the regulatory context in Washington, i.e., for use in standards for water quality, surface water cleanup, and sediment cleanup.[235] Ecology's "measures of technical defensibility" considered survey design and testing; survey execution, including QA/QC; publication and review of results; applicability to the regulatory context; and overall technical suitability.[236] As documented at length in the FCR TSD, each of the tribal studies considered – that is, the CRITFC survey, the Tulalip and Squaxin Island survey, and the Suquamish survey – was found to have "satisfied" Ecology's measures of technical defensibility.[237]

Moreover, the scientific defensibility of each of the tribal studies had previously been considered and affirmed in various assessments by EPA and by sister states.[238] After an evaluation of the surveys according to five criteria, including the study's "soundness," "applicability and utility," "clarity

[235] ECOLOGY, FCR TSD, *supra* note 149, at 31-71.
[236] *Id.* at 39-45 (noting that Ecology's "measures of technical defensibility" were developed based on EPA guidance and in consultation with experts from the University of Washington School of Public Health).
[237] *Id.* at 47-71.
[238] By contrast, recall the surmise and guesswork by non-tribal government scientists that was revealed to support the 6.5 g/day FCR relied upon by EPA and the states. *See* O'Neill, Variable Justice, *supra* note 10, at n.150. Note that Idaho recently conducted its own assessment of the quality and scientific defensibility of 19 fish consumption surveys from around the Pacific Northwest; of these, only six, including the three tribal studies relied upon by Ecology in its FCR TSD and the more recent Lummi Nation study, received "a score of 10 or better." Idaho Department of Environmental Quality, Quality of Survey Criteria Rating Matrix (Nov. 26, 2012), *available at* http://www.deq.idaho.gov/media/924655-58-0102-1201-quality-of-survey-criteria-rating-matrix.pdf (last visited Apr. 20, 2013). Interestingly, the Pierce, et al., study, which provides the current default FCR for Washington's MTCA, received a score of 3. *Id.*

and completeness," its handling of "uncertainty and variability," and whether the study's methods and information were "independently verified, validated, and peer reviewed," EPA selected each of the tribal studies for inclusion in its general guidance document for conducting exposure assessments, the *Exposure Factors Handbook*.[239] EPA Region X, moreover, recommends the Tulalip/Squaxin Island and Suquamish studies in its guidance for cleanups in Puget Sound, giving "highest preference" to these "well-designed consumption surveys."[240] Oregon's independent Human Health Focus Group conducted an extensive year-long review and found each of these studies to be scientifically defensible, deeming them both "reliable" and "relevant."[241] ODEQ went on to base its WQS, which EPA approved, on a FCR derived from these surveys.

Still, the scientific defensibility of the tribal studies has been questioned, repeatedly, by individuals and industry as part of the Washington process. Some commenters asked that the tribal survey data be "verified" or sought additional "peer-reviewed studies generated through traditional means."[242] Some commenters called for the raw data (as opposed to the studies summarizing the survey results) to be "turned over" for "independent review"[243] – a highly unusual request in general,

[239] U.S. ENVIRONMENTAL PROTECTION AGENCY, EXPOSURE FACTORS HANDBOOK: 2011 EDITION 1-4 to 1-7, 10-47 to 10-48; 10-51 to 10-53 (2011) [hereinafter EPA, EXPOSURE FACTORS HANDBOOK].

[240] U.S. ENVIRONMENTAL PROTECTION AGENCY REGION X, FRAMEWORK FOR SELECTING AND USING TRIBAL FISH AND SHELLFISH CONSUMPTION RATES FOR RISK-BASED DECISION MAKING AT CERCLA AND RCRA CLEANUP SITES FOR PUGET SOUND AND THE STRAIT OF GEORGIA 1, 6-7 (Aug., 2007) [hereinafter EPA REGION X, FRAMEWORK] (concluding that "[b]ecause of the quality of the survey methodology used in the available Puget Sound Tribal studies, EPA believes that these studies are appropriate to use to develop Puget-Sound harvested fish and shellfish consumption rates. Further, EPA believes that the rates developed from the aforementioned studies should be used in preference to an estimate of an average subsistence consumption rate, as recommended in the EPA AWQC methodology.").

[241] ODEQ, HHFG REPORT, *supra* note 149 at 39-40.

[242] *See, e.g.,* Bruce Howard, Comments on FCR TSD (Jan. 18, 2012) (respecting the tribal surveys, "it is incumbent on Ecology to seek additional verification of this information, as well as peer-reviewed studies generated through traditional means.").

[243] *See, e.g.,* Northwest Pulp & Paper Association, Proposed Meeting Agenda for Ecology, *supra* note 220, at 2 (questioning why the tribal and other studies on which Ecology relied in its TSD "have not been made available for review by the general public;"

given the ethical protocols that govern studies with human subjects,[244] and a request in this context that is at the very least insensitive, given tribal populations' understandable mistrust of handing over their raw "data" to outsiders.[245] Some commenters questioned the plausibility of the survey results or the veracity of tribal respondents. One individual, for example, questioned the "validity" of the rates documented by the Suquamish study:

> For bivalves (i.e., crabs, mussels, oysters), the maximum reported portion sizes range from 1,349 g (2.5 pounds) for mussels to an incredible 2,720 g (6 pounds) for geoduck. I have a hard time envisioning anyone eating 6 pounds of geoduck clams in one meal….[t]hese extreme portion sizes certainly raise the question of whether the responses given by the individual(s) reporting such portion sizes are believable.[246]

Although the Suquamish study explicitly considered the appropriate treatment of high-end responses (so-called "outliers"), and its analysis and conclusions underwent external technical review, this commenter claimed that, "[a]pparently, the study authors never questioned whether these respondents were truthful and whether their responses should be

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asking "[w]hy has that data not been peer reviewed?;" and stating that "[a]ll survey data (not just summary statistics) must be available for independent analysis").

[244] *See* Letter from William Daniell, Associate Professor, University of Washington Department of Environmental and Occupational Health Sciences, to Craig McCormack, Toxics Cleanup Program, Washington State Department of Ecology (Mar, 20, 2012) (confirming that standard practice does not involve releasing raw data and that study participants' privacy rights might be violated if so).

[245] *See, e.g.,* Letter from Babtist Paul Lumley, Executive Director, CRITFC, to Ted Sturdevant, Director, Washington State Department of Ecology, *supra* note 234 (noting the "disturbing" and inappropriate nature of this request and observing that, among other things, compliance would require CRITFC to violate confidentiality agreements with the survey respondents); *see generally,* Anna Harding, et al., *Conducting Research with Tribal Communities: Sovereignty, Ethics and Data-Sharing Issues*, 120 ENVIRONMENTAL HEALTH PERSPECTIVES 6 (Jan., 2012) (describing misuse of tribal tissue samples, identifying information, and other raw "data" by researchers and discussing ways for tribes to avoid such harms).

[246] Lawrence McCrone, Comments on FCR TSD 5 (Jan. 18, 2012). Mr. McCrone noted that he was offering comments in his capacity as a private citizen, and that his comments ought not be construed as representing his employer or his clients. *Id.* at 1.

included."[247] This commenter criticized the study authors' self-conscious determination that these were values that were not in fact recorded in error, and so ought not be excluded from the dataset, as one that "presses the limits of credibility" [248] – despite the fact that this determination comports with best practices and operates here to *reduce* bias in reporting survey results.[249]

Ecology staff, to their credit, were from the outset consistently open to the tribal surveys, and Ecology recognized these studies as the best available science in its initial FCR TSD. Ecology also called upon experts at the University of Washington School of Public Health to explain the standard practice in the field with respect to custody of survey data – an explanation that confirmed the inappropriateness of requests that the raw data be turned over to the public.[250] Ecology leadership, too, stood up for the scientific defensibility and relevance of the tribal studies in explaining to the legislature that additional studies were not warranted.[251] And Ecology obviously cannot be responsible for the content of comments it received from the public. However, Ecology also structured what was arguably a largely redundant inquiry into the scientific defensibility of the tribal studies in the first place, given the extensive technical review that these studies had already undergone in Oregon and by the EPA.[252]

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[247] *Id.* at 5-6.
[248] *Id.* at 6. Boeing, too, took issue with the Suquamish survey's treatment of high-end responses, pointing out that "none of the data were excluded and no corrections to the highest recorded consumption rates were made," and urging Ecology to note this point. Boeing, FCR TSD 2.0 Comments, *supra* note 222, at 13.
[249] *See* Donatuto & Harper, *supra* note 14; EPA, EXPOSURE ASSESSMENT GUIDELINES, *supra* note 143, at 65 (stating that "[o]utliers should not be eliminated from data analysis procedures unless it can be shown that an error has occurred in the sample collection or analysis phases of the study. Very often outliers provide much information to the study evaluators.").
[250] *See* Letter from William Daniell, Associate Professor, University of Washington Department of Environmental and Occupational Health Sciences, to Craig McCormack, Toxics Cleanup Program, Washington State Department of Ecology, *supra* note 244 (indicating that this assessment of standard practice was given in response to an Ecology request for the opinion of an expert in the field).
[251] Sturdevant, House Testimony, *supra* note 228 (stating "I'm confident that the studies that we're relying on were done with all appropriate scientific rigor").
[252] *See* Wagner, *supra* note 226, at 1341, 1352 (discussing model of agency accountability that invites redundant or peripheral information, and agencies' tendency to

Ecology then prolonged this inquiry through multiple comment periods on two versions of its FCR TSD.[253]

C. Dilute

The participants in the process may have come to recognize that, at some point, the FCR is likely to increase; so those opposing more protective standards have also turned their attention to diluting a more protective FCR by application of fractional multipliers. The arguments for these devices can be boiled down to claims that take the following forms: although contemporary fish consumption has been documented at X grams/day, (1) only a fraction of the fish captured by this rate is obtained from regulated waters, and (2) only a fraction of even this locally-obtained fish is comprised by species whose contaminants are attributable to regulated waters or sites. These devices go by different names; usage is not consistent. For purposes of this article, it will suffice to discuss the first concept in terms of a "diet fraction," and the second concept in terms of a "site use factor."[254]

The argument advanced in favor of applying a diet fraction is that, although fish consumption surveys document an individual's total fish intake, this total generally includes an amount of fish that is "locally caught" (i.e., obtained in waters within the regulatory jurisdiction of the relevant state or tribe) and an amount of fish that is caught "elsewhere" (i.e., obtained in waters outside the regulatory jurisdiction of the relevant state or tribe – caught, for example, in the Atlantic Ocean or the Great

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reflect detailed and even extraneous comments in their own process and documents, "in order to avoid accusations of insufficient attention to detail").

[253] Washington State Department of Ecology, "Fish Consumption Rates (FCR) Technical Support Document (TSD), Version 2: Technical Review Meetings," *available at* http://www.ecy.wa.gov/programs/tcp/regs/fish/2012/Tech-Review-Meetings/Tech-Mtgs.html (last visited Apr. 20, 2013) (announcing availability of two additional technical review meetings after the close of the public comment period on Ecology's FCR TSD 2.0). *See generally, id.*

[254] This usage matches the terms that are employed by Ecology in proposed guidance accompanying its recently promulgated SMS rule, although the arguments included within each concept are different than, for example, under the concepts used by EPA Region X in its Framework.

Lakes).[255] Because the latter will not be affected, the argument goes, by more stringent environmental regulation in the relevant state or tribe, this quantity ought to be excluded from the estimate of fish intake used to calculate health-based standards. This is the argument in its most straightforward form. A variation on this argument, raised particularly in the sediments context, is that where an individual "site" – for example, a small lake or a narrowly delineated portion of an urban bay – cannot support fish production and harvest sufficient to supply the total daily intake represented by the FCR, a fractional multiplier should be applied to arrive at the estimated actual production and harvest at the site.[256] The term "support" in this argument is construed broadly. It can refer to limitations on productivity and harvest that are natural or human-made (for example, limitations due to shoreline armoring or other built infrastructure that currently displaces quality intertidal habitat at the site; or to the presence of debris that would impede access to harvest at the site; or to evidence of predation and disease due to non-site related contaminants such as fecal coliform).[257] As such, it takes as a given many sources of current habitat degradation or alteration, and the resulting losses to the

[255] *See, e.g.,* Boeing, FCR TSD 2.0 Comments, *supra* note 222, at 6 (requesting more precise information for sources of fish currently consumed by tribes and arguing that only that fraction of current fish intake derived from locally caught fish ought to be included in FCR); Pope Resources, Comments on Ecology's FCR TSD (Jan. 17, 2012) (opining that "we all" obtain fish and shellfish from a "wide range of sources (including our neighborhood markets)" and stating that, therefore, "[t]here is no rational reason to assume that an individual would obtain 100 percent of their diet of these species from a single, small geographic area. The diet fraction used in the cleanup (MTCA) regulation of 50 percent [i.e. 0.5] for risk assessment calculations is already highly conservative"); *see generally* WASHINGTON STATE DEPARTMENT OF ECOLOGY, DRAFT SEDIMENT CLEANUP USERS MANUAL II: GUIDANCE FOR IMPLEMENTING SEDIMENT MANAGEMENT STANDARDS, CHAPTER 173-204 WAC 9-5 (Aug., 2012), *available at* https://fortress.wa.gov/ecy/publications/publications/1209057.pdf (last visited Apr. 20, 2013) [hereinafter ECOLOGY, DRAFT SCUM II]. *See also* Washington State Department of Ecology, *SMS Rulemaking* (Aug. 15, 2012), *available at* http://www.ecy.wa.gov/programs/tcp/regs/2011-SMS/2011-SMS-hp.html (last visited Apr. 20, 2013) (stating that the draft guidance "is not part of the public comment process" i.e., Ecology is not requesting comments on the methods set forth in the guidance as part of the SMS comment process).

[256] *See* ECOLOGY, DRAFT SCUM II, *supra* note 255. *Id.* at 9-5.

[257] *See, e.g.,* Boeing, FCR TSD 2.0 Comments, *supra* note 222, at 12 (arguing that Ecology should consider the current availability of high quality habitat to support fish and shellfish).

productivity or health of the fish resource at a site; it in effect renders permanent these adverse impacts, assuming away current and potential restoration efforts. In any case, a diet fraction operates to reduce a survey-derived fish consumption rate by excluding a portion of fish intake that is determined not to "count." So, for example, if a FCR in Washington were based on a survey documenting fish intake at 100 g/day, 75% of which was obtained from Washington waters and 25% of which was obtained from the Atlantic Ocean, a diet fraction of ¾ (or 0.75) could be applied as a multiplier in the risk assessment equation. The effect is that a 75 g/day intake rate would now serve as the basis for calculating tolerable contaminant levels for Washington's environmental standards.

However, tribal members currently *do* obtain most or all of their fish from local waters. As documented by contemporary surveys of tribal consumption practices, tribal members are fishers who bring home their catch; tribal members are harvesters who obtain shellfish from local beaches – and the fruits of these efforts are shared with others in the tribe, including elders and children.[258] Moreover, tribal members are entitled, under the treaties and other legal agreements securing their fishing rights, to do so in perpetuity. So even if tribal members in contemporary times have not been able to supply 100% of their fish needs from local sources – perhaps because of depletion of the resource or human-made impediments to access – this contemporary snapshot does not reflect the practices to which tribes are entitled. Yet, if environmental standards are determined by applying a diet fraction based on such constrained contemporary practices, they *will* result in waters that support only this reduced ability to supply tribal families' tables with locally harvested fish. Water quality standards, including sediment cleanup standards, determine the future conditions of our waters; application of a diet fraction limits this future by reference to a contaminated and depleted present. As elaborated in the next Part, this is not a result that is permitted under the treaties and other legal guarantees of tribes' rights.

[258] *See, e.g.,* LUMMI NATION SEAFOOD CONSUMPTION STUDY, *supra* note 15 at 3-7, 10, 54-55; SUQUAMISH TRIBE, FISH CONSUMPTION SURVEY, *supra* note at 13, at 4, 51-62.

The argument advanced in favor of applying a site use factor is that, although locally caught fish may be contaminated, depending on the life histories of the various species that are locally caught, some portion of their contaminant body burdens may be attributable to sources and sites outside of the relevant state's or tribe's jurisdiction. Because these species' contaminant body burdens will not be (much) affected, the argument goes, by more stringent environmental regulation in the relevant state or tribe, the quantity of intake accounted for by these species ought to be reduced or excluded from the estimate of fish intake used to calculate health-based standards. For example, as Ecology stated in proposed guidance to accompany its new SMS rule: where a FCR is based on consumption of a high proportion of salmon, "in this case, the [site use factor] may be reduced to reflect the fact that the concentrations of contaminants in the salmon's tissue are primarily related to sources other than the site."[259] According to this same guidance, a site use factor might be calculated by "divid[ing] the time that the fish spends at the site by the lifetime of the fish (migrating species)" or by "divid[ing] the area of the site by the size (area) of the home range of the fish/shellfish being consumed (non-migrating species)."[260] So, if 2/3 of the locally-caught fish reflected in the 75 g/day figure above were recorded in the survey as salmon, and salmon were deemed to obtain their contaminant body burden primarily outside of regulated waters – a contestable determination, taken up below –, a site use factor of 2/3 (or 0.67) could be applied as a multiplier in the risk assessment equation. The effect is that a 25 g/day intake rate would now serve as the basis for calculating tolerable contaminant levels.

Here too, tribes' rights mean that an analysis of the argument for a site use factor must be different. First, the argument depends on a static conception of the particular mix of species that will comprise a person's fish intake, namely, the mix reflected in contemporary surveys of consumption. But tribal members are free – as they have always been free – to determine how they will exercise their rights to take the various species of fish that are present in their usual and accustomed fishing

[259] *See* ECOLOGY, DRAFT SCUM II, *supra* note 255, at 9-6.
[260] *Id.*

places.[261] They may, for example, consume more of a particular resident species in the future than in the past, and this species might have relatively high affinity for a given site. Yet if environmental standards are determined based on an assumption that this resident species comprises only a small portion of total fish intake and site use factors are applied to the portions of fish intake comprised by other species, the larger concentrations of contaminants that are thereby permitted to remain in place will sully the fish in fact affected by the site. Additionally, the argument for a site use factor simply ignores the fact that contaminants themselves cannot be confined to a given site: they get re-suspended, transported, and dispersed. While those responsible for contaminating sites may be able to persuade regulators to assume away this fact in other contexts, where such assumptions operate to undermine treaty-secured rights, they are not appropriate.

It bears emphasizing that application of both of these devices for diluting the FCR – the diet fraction and the site use factor – has a *multiplicative* effect on the risk assessment equation. Thus, even a comparatively protective FCR can be gutted, for example, if it is halved by application of a diet fraction of 0.5 and then halved again by application of a site use factor of 0.5. An FCR of 200 g/day, by application of these devices, would effectively become just 50 g/day.

Ecology has indicated its willingness at least to entertain both of these devices for diluting a more protective FCR.[262] Thus, in its new SMS and the proposed guidance, Ecology anticipates that a diet fraction or a site use factor or both may be applied as part of its site-specific calculation of risk.[263] Ecology is still in the process of refining its SMS guidance, but

[261] This point is discussed further in Part VII, *infra*.
[262] Note, too, that Washington's current cleanup regulation for surface waters, MTCA, employs a default diet fraction of 0.5, thereby routinely halving the default FCR of 54 g/day. I have criticized the application of a diet fraction in this regulation, given that the 54 g/day FCR comes from a creel survey, which is a method that records only locally harvested fish. The diet fraction here is arguably a gratuitous device to reduce the effective FCR. See O'Neill, *Variable Justice*, *supra* note 10, at n.152.
[263] WASHINGTON STATE DEPARTMENT OF ECOLOGY, SEDIMENT MANAGEMENT STANDARDS, CHAPTER 73-204 WAC, FINAL RULE (Feb. 22, 2013). The final SMS rule, adopted by Ecology on February 22, 2013, will become effective September 1, 2013. Washington

its current draft proposes methods for applying these concepts and accepts that intake reflecting salmon may thus be excluded from a FCR used to calculate cleanup standards.[264] Although, as noted above, Ecology's initial FCR TSD set forth a recommended range of scientifically defensible FCRs and declined to exclude salmon from this range, this recommendation has been stripped from later versions of the FCR TSD. Ecology is still considering whether it will apply these concepts to its WQS.

D. Distort

All participants in the process have recognized that a FCR that excludes salmon would be greatly reduced. As noted above, data show that salmon are contaminated at levels that pose a threat to human health and several fish consumption advisories include salmon among the species for which intake should be curtailed or avoided altogether. However, given salmon's anadromous habit, and given that a portion of many salmon life histories is spent outside of the waters over which Washington asserts regulatory jurisdiction, (i.e., in the Pacific ocean beyond the three-mile coastal zone), it has been argued that salmon ought to be excluded from the tally of fish intake, because their contaminant body burden comes from "elsewhere." The stakes are not small: estimates of fish consumption in the local surveys considered by Ecology would be reduced by from 25% to over 50% if salmon were excluded.[265]

Current scientific evidence doesn't permit one to determine the precise source of the contaminants harbored by salmon. As sketched above, the data for Puget Sound reveal a south-north gradient such that South Sound salmon, which must run a greater gauntlet of contaminated environments in its outward and homeward migrations than its Georgia

State Department of Ecology, "SMS Rulemaking," available at http://www.ecy.wa.gov/programs/tcp/regs/SMS/2013/Adopted-Rule.html (last visited Apr. 20, 2013).

[264] *See* ECOLOGY, DRAFT SCUM II, *supra* note 255, at 9-5 to 9-7.

[265] ECOLOGY, FCR TSD 2.0, *supra* note 149, at App C at C-4 through C-5 (stating that if salmon were excluded from total fish intake rates, the Suquamish fish consumption rate would be reduced by 25%, from 766.8 g/day to 583 g/day; the Tulalip and Squaxin Island rate would be reduced by about 50%, from 194 g/day to 97.6 g/day (using EPA's adjusted numbers for this dataset); and the CRITFC rate would be reduced by more than 50%, from a weighted mean of 63 g/day to 40 g/day).

Strait and Pacific coastal counterparts, have significantly greater concentrations of bioaccumulative toxicants in their tissue. Other data from around the region show the presence of contaminants in the salmon at various life stages, including in outmigrating juveniles still in freshwater environments.[266] Moreover, there is considerable variability, even within species, in salmon's behavior. As noted above, Chinook salmon originating in the rivers of the Puget Sound watershed, for example, typically migrate out to the Pacific and forage along the coastal continental shelf; however, a substantial portion of these salmon display "resident" behavior, remaining in the Puget Sound during the marine phase of their lives. Further, "the waters of Washington" include the Puget Sound, portions of the Straits of Juan de Fuca and the Columbia River, and Pacific coastal waters to a distance of three miles, and contaminants released or re-suspended at one location may be transported to another. It is likely, therefore, that some salmon get all of their contaminants from sources for which Washington has regulatory responsibility, and some salmon get only some of their contaminants from sources for which Washington has regulatory responsibility.

Faced with a similar (albeit not geographically identical) regulatory question, Oregon retained salmon in its FCR. While EPA approved Oregon's determination in this respect, EPA Region X's own guidance for Puget Sound cleanups permits salmon to be excluded and provides factors to be considered in determining whether salmon's contaminant body burden is likely to be due to "site-related contaminants."[267] Industry

[266] *See, e.g.,* Lyndal L. Johnson, et al, *Contaminant Exposure in Outmigrant Juvenile Salmon from Pacific Northwest Estuaries of the United States*, 124 ENVIRONMENTAL MONITORING & ASSESSMENT 124 (2007); Catherine A. Sloan, et al., *Polybrominated Diphenyl Ethers In Outmigrant Juvenile Chinook Salmon From The Lower Columbia River And Estuary And Puget Sound, WA*, 58 ARCHIVES OF ENVIRONMENTAL CONTAMINATION & TOXICOLOGY 403 (2010); Gladys K. Yanagida, et al., *Polycyclic Aromatic Hyrdocarbons and Risk to Threatened and Endangered Chinook Salmon in the Lower Columbia River Estuary*, 62 ARCHIVES OF ENVIRONMENTAL CONTAMINATION & TOXICOLOGY 282 (2012).

[267] EPA REGION X, FRAMEWORK, *supra* note 240, at 10.

has been pushing to have salmon excluded from FCRs in Washington, including from the WQS.[268]

In this heated discussion, distortions of the science have sometimes taken place.[269] The National Council for Air and Stream Improvement, Inc. (NCASI) describes itself as "an independent, non-profit membership organization that provides technical support to the forest products industry on environmental issues. An important part of our mission is to ensure that regulatory decision making is based on sound science."[270] NCASI states that "the science clearly shows that >95% of the contaminant body burden found in adult salmon is accumulated in the open ocean."[271] The studies upon which NCASI relies, however, make no such finding. Rather, they find that contaminant body burdens on this order are accumulated by salmon "*in marine waters*" – including the waters of the Puget Sound. To appreciate the difference in these two formulations, one needs to recall the relevant geography.

The Puget Sound comprises a vast inland marine environment, with numerous interconnected channels, inlets and bays. It is connected to the Pacific Ocean by the Strait of Juan de Fuca. The Puget Sound watershed is over 13,700 square miles, draining rivers on the west side of the Cascade Mountains and on the east and north sides of Olympic Mountains. If one were to swim from Budd Inlet in the south, near the city of Olympia, north through Admiralty Inlet and ultimately west, out through the Strait of Juan de Fuca, one would traverse roughly 200 miles before

[268] *See, e.g.,* Boeing, FCR TSD 2.0 Comments, *supra* note 222, at Attachment 1 "Exclusion of Salmon Consumption from Fish Consumption Rate."
[269] The next six paragraphs draw on material from a blog previously posted to the Center for Progressive Reform website. Catherine O'Neill, "(Puget) Sound Science" (Nov. 8, 2012), *available at* http://www.progressivereform.org/CPRBlog.cfm?idBlog=E072AEC3-A728-A0BD-32965A41D8C66EBB (last visited Apr. 20, 2013).
[270] National Council for Air and Stream Improvement, Inc., Comments on Ecology's FCR TSD 2.0 (Oct. 24, 2012) [hereinafter, NCASI, FCR TSD 2.0 Comments]. NCASI's Comments on the FCR TSD 2.0 are cited and incorporated by reference by other industry commenters. *See, e.g.,* Northwest Pulp & Paper Association, Comments on Ecology's FCR TSD 2.0 (Oct. 25, 2012): Boise White Paper, LLC, Comments on Ecology's FCR TSD 2.0 (Oct. 26, 2012); Georgia-Pacific, Comments on Ecology's FCR TSD 2.0 (undated document); Weyerhauser, Comments on Ecology's FCR TSD 2.0 (Oct. 26, 2012).
[271] NCASI, FCR TSD 2.0 Comments, *supra* note 270, at 1.

reaching the Pacific Ocean. And, of course, as pointed out above, salmon don't necessarily take the most direct route; their migration patterns on both outward and homeward migration are more elaborate and complex.

The principle studies cited by NCASI are by Sandra O'Neill and Jim West,[272] and by Donna Cullon, et al..[273] Both studies recognized that anthropogenic influences had contributed to contamination of the Puget Sound watershed and set out to determine the source of contaminants in Pacific salmon, as between their freshwater and saltwater environments. The O'Neill & West study looked at PCBs in Chinook salmon; the Cullon, et al., study looked at a host of persistent organic pollutants (POPs), including PCBs, dioxins and furans, and DDT. Both studies sampled out-migrating juveniles and returning adult salmon at several locations. The O'Neill & West study sampled five "in-river" (i.e., freshwater or estuarine) locations ranging from the Deschutes River in the south to the Nooksack River in the north, as well as two marine locations in the south and central Puget Sound. The Cullon, et al., study sampled two in-river locations, the Deschutes and the Duwamish.

O'Neill & West found, first, that the average PCB concentration in returning adult Puget Sound Chinook was 3 to 5 times greater than average concentrations reported in adult Chinook at six other West Coast locations outside Puget Sound. O'Neill & West concluded that "the elevated PCB levels observed for Puget Sound Chinook salmon relative to coastal populations were probably associated with differences in PCB contamination in the environments they inhabit or with differences in diet." O'Neill & West also concluded that, although salmon uptake some PCBs from freshwater environments, the elevated concentrations of PCBs found in adult Chinook "were accumulated during residence in marine habitats rather than riverine habitats in the region." They reported that "adult Chinook salmon that had migrated as subyearlings from the Duwamish River, the most highly PCB-contaminated river draining into Puget Sound, accumulated the vast majority (>96%) of PCBs during their marine life

[272] O'Neill & West, *supra* note 27.
[273] Donna L. Cullon, et al., *Persistent Organic Pollutants in Chinook Salmon (Oncorhynchus tshawytscha): Implications for Resident Killer Whales of British Columbia and Adjacent Waters*, 28 ENVIRONMENTAL TOXICOLOGY & CHEMISTRY 148 (2009).

history phase, whereas there was little PCB contribution from freshwater." Although Cullon, et al., sampled a small number of fish at fewer locations, their conclusions were similar.[274]

We can now see the mischief in NCASI's characterization of these studies' findings. NCASI's statement that "the science clearly shows that >95% of the contaminant body burden found in adult salmon is accumulated *in the open ocean*"[275] treats the marine waters of the inland Puget Sound and Strait of Juan de Fuca as if they were the open Pacific Ocean. NCASI's characterization implies that the contaminants found in salmon don't come from sources and waters for which the state of Washington has regulatory responsibility, because "the open ocean" is beyond its jurisdiction.[276] Both O'Neill & West's discussion and their study design make clear that their findings distinguish between contaminants taken up during the salmon's freshwater phase, on the one hand, and their saltwater phase, on the other. With in-river sampling locations, returning adults will have spent considerable time in the marine waters of Puget Sound and the Strait of Juan de Fuca, both on their outward and homeward migrations.

NCASI and other industry commenters have urged that salmon be excluded from the tally of people's fish intake for purposes of environmental standard-setting, on the theory that these industries are not responsible for the contaminants that are showing up in the salmon. Although they purport to invoke "the science" in support of this stance, the studies don't say what NCASI says they say.

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[274] *Id.* at 154 ("By comparing body burdens of POPs in returning adult Chinook to out-migrating smolts and juveniles, we estimate that 97 to 99% of the body burden of PCBs, PCDDs, PCDFs, DDT, and HCH in all stocks originated during their time at sea … Our estimation that the majority of POPs in Chinook salmon can be ascribed to their growth stage in coastal and marine waters is consistent with other studies. A study of Chinook from Washington ascribed 99% of PCBs in returning Duwamish River adults to the waters of Puget Sound and the Pacific Ocean.").

[275] NCASI, FCR TSD 2.0 Comments, *supra* note 270, at 1 (emphasis added).

[276] Admittedly, the Cullon, et al., study does not aid understanding by using the phrase "at sea" to describe the marine waters, both inland and coastal, in which salmon spend the saltwater phase of their lifecycles. However, both the subsequent text and, more notably, the study design itself, clarify the authors' usage. *See* Cullon, et al., *supra* note 273, at 154.

E. Deny

Industry has advanced two arguments that would require us to deny what we know about the facts on the ground in Washington. These arguments require us to deny that we know there are actual people who consume fish at the greatest rates, from the same local places, for their entire lives, and to deny that we know precisely *who* these people are – namely, tribal people. These arguments are offered to offset an increased FCR or to counteract the use of tribal survey data. The first argument suggests that if Ecology increases its FCR, it should increase the amount of risk it deems "acceptable." The second argument urges Ecology to adopt less protective values for other parameters in the risk assessment equation or to employ probabilistic risk assessment techniques if it is to use tribal consumption data to derive the FCR.

Under the first argument, Ecology is urged to alter its acceptable risk level, which, under its current WQS is set at 1 in 1,000,000.[277] Industry and others have argued that Ecology should deem acceptable risks as great as 1 in 10,000. The claim is sometimes for a bald offset: a more protective FCR would mean more stringent standards if the acceptable risk level remains the same, *so* Ecology should decide to tolerate more risk.[278] In other instances, the argument is supported by the point that other agencies have found greater risk levels tolerable in a variety of contexts.[279] The EPA, for example, in its AWQC Methodology, has indicated that it would entertain standards set to achieve risk levels as great as 1 in 10,000 for highly-exposed subpopulations. The argument is also sometimes supported by the claim that only a relatively small number of people out of a larger population will end up facing this increased risk

[277] WASH. ADMIN. CODE § 173-201A-240 (2011) (standards for carcinogens shall be set so that excess risk is "less than or equal to" one in 1,000,000).
[278] *See, e.g.,* Stoel Rives, LLP, Comments on Ecology's Triennial Review (Dec. 17, 2010), *available at* http://www.ecy.wa.gov/programs/wq/swqs/TriennialRevComm/Stoel_Rives_Loehr.pdf (last visited Apr. 20, 2013).
[279] *See, e.g.,* NATIONAL COUNCIL FOR AIR AND STREAM IMPROVEMENT, INC., A REVIEW OF METHODS FOR DERIVING HUMAN HEALTH-BASED WATER QUALITY CRITERIA WITH CONSIDERATION OF PROTECTIVENESS 3 (Aug. 2012) [hereinafter NCASI, RISK ASSESSMENT WHITE PAPER] (observing that "[t]arget cancer risk levels between 10-6 and 10-4 have become widely accepted among the different EPA programs.")

level.[280] Finally, the argument has been supported by an understanding of the issue in terms of hypothetical or statistical lives. Thus, in considering agencies' responses to variability in the risk assessment context, some members of the National Research Council have offered the following perspective:

> [S]ome argue that people should be indifferent between a situation wherein their risk is determined to be precisely 10^{-5} or one wherein they have a 1% chance of being highly susceptible (with risk = 10^{-3}) and a 99% chance of being immune, with no way to know which applies to whom. In both cases, the expected value of the individual risk is 10^{-5}, and it can be argued that the distribution of risks is the same, in that without the prospect of identifiability, no one actually faces a risk of 10^{-3}, just an equal chance of facing such a risk.[281]

As I have pointed out elsewhere, however, the necessary condition for such indifference doesn't exist in the context of environmental exposure analysis, where there is not only the prospect but the fact of identifiability: we *already know* the identities of those most exposed; we already know that it is tribal people who face the greatest risk from contaminated fish.[282] Thus, in order to maintain that we all have "an equal chance of facing [an elevated] risk," we would have to deny what we know about fish consumption practices in Washington. Similarly, while the *number* of people who will be exposed to elevated risk is small relative to the entire Washington population, we can point to who these people are in the crowd – as such, we cannot, without denying this knowledge, pretend to be debating the fate of abstract numbers. Finally, whether EPA may permit states to countenance greater risks for other higher-consuming populations, it cannot license states to so burden the exercise of treaty-

[280] *Id.* at 3-4, 18. (arguing that if only a small population faces the greatest risk, i.e., $1(10^{-4})$, then the number of excess cancers would be "[essentially] zero").
[281] NATIONAL RESEARCH COUNCIL, SCIENCE AND JUDGMENT IN RISK ASSESSMENT 213-216 (1994). Note that this view that risk is either one or zero is controversial and does not command consensus of the National Research Council. *Id.*
[282] O'Neill, *Variable Justice*, *supra* note 10, at 73-75.

secured rights by failing to acknowledge precisely who is affected and what is at stake were risk levels to be altered as industry has advocated.

Under the second argument, Ecology is urged to adopt less protective (e.g., mean or median) values for other parameters in the risk assessment equation or to enlist probabilistic risk assessment techniques if it is to use tribal consumption data to derive the FCR. Industry has argued that the use of high-end exposure values (e.g., 90th or 95th percentile values) for most or all of the exposure parameters (i.e., fish intake, exposure duration)[283] will result in an estimate of risk that is overly "conservative." For example, a white paper produced by NCASI and submitted to the record by the Northwest Pulp & Paper Association asserts that "[i]t is well-known, and mathematically intuitive, that the practice of selecting "upper end of range" values for multiple parameters in a risk equation will lead to over-conservative estimates of risk or, in the case of [human health ambient water quality criteria], overly restrictive criteria."[284] The mathematical aspect of this claim is illustrated by this example: "the use of just three conservative default variables (i.e., 95th percentile values) yields [an estimate of] exposure in the 99.78th percentile. Adding a fourth default variable increases the estimate to the 99.95th percentile value." [285] The impact of such "compounded conservatism," NCASI argues, is a "highly unlikely and highly protective

[283] Note that bodyweight is an exposure parameter that functions in the opposite direction; that is, while fish intake and exposure duration are parameters in the numerator of an exposure assessment equation, bodyweight is a parameter in the denominator of this equation. As a consequence, a selection of a relatively lower value (e.g., mean or median) for bodyweight will have the effect of increasing the estimate of exposure and risk, and so requiring more protective environmental standards. Industry tends, therefore, to advocate the use of relatively higher values for this parameter, but relatively lower values for the other parameters. *See, e.g.,* NCASI, RISK ASSESSMENT WHITE PAPER, *supra* note 279, at 20. Debate about exposure parameters nonetheless generally refers to "high-end" values as being the most protective. This discussion in this article is in keeping with this general practice, but is caveated by this note about bodyweight and by the fact that different considerations, beyond the scope of this article, may come into play when considering the appropriate assumptions for bodyweight in a risk assessment equation. Thus, this article assumes that the standard assumption (generally, 70kg for adults) is appropriate for this context.

[284] *Id.* at 1.

[285] *Id.* at 27.

scenario."[286] Boeing similarly cites this problem with "compounding levels of conservatism inherent in the deterministic approach" and suggests that it might be avoided by enlisting probabilistic techniques.[287] NCASI points to the impact of selecting high-end exposure assumptions rather than mean or median values on the resulting water quality standards: "the assumption that a person lives in the same place and is exposed to the same level of contamination for a 70 year lifetime results in criteria that are up to 8 times more stringent than if a median exposure period were assumed."[288]

The aspect of this claim that states or implies that the high-end values for the various exposure parameters are inaccurate – and, specifically, *over*-estimates of actual exposure – requires scrutiny. First, as I have observed elsewhere, it is useful to clarify terminology.[289] The various parameters in a risk assessment equation may be characterized by uncertainty or variability. In cases of uncertainty, we lack knowledge about the true value of the parameter in question. Any choice of a value will be in error. A conservative assumption reflects a choice between errors: specifically, that it is better to overestimate risk than to underestimate risk. In cases of variability, by contrast, we *know* the true value for the parameter in question and it is in fact described by a range. The "value" for fish intake in the general U.S. population, for example, is actually a range of values, which can be represented as a distribution. A protective assumption reflects a choice within the range of true values: one that determines that everyone, even those who consume relatively high amounts of fish, merits protection. The choice of a median or 90th or 99th percentile value for an exposure parameter that is characterized by variability, then, is not a matter of being more or less conservative. *It is a matter of deciding, with full knowledge, whom to protect.* For clarity, I have suggested speaking of degrees of "conservatism" only in connection

[286] *Id.*
[287] Boeing, FCR TSD 2.0 Comments, *supra* note 222, at 16-17 (urging Ecology to follow Florida's lead and adopt a probabilistic approach, arguing that it results in more realistic and accurate estimates of risk).
[288] NCASI, RISK ASSESSMENT WHITE PAPER, *supra* note 279, at 3. NCASI's comparison is to a median residence time of 8 years. *Id.* at 24-25.
[289] *See generally* O'Neill, *Variable Justice*, *supra* note 10, at 64-75.

with responses to uncertainty, and referring to levels of "protectiveness" when discussing responses to variability.[290] With terminology thus clarified, the remainder of this second argument can be parsed. While Ecology's use of a 90th percentile value from tribal studies for exposure parameters such as fish intake and exposure duration might be relatively protective, this does not necessarily mean that it is unrealistic or "unlikely."

Yet this is precisely the claim NCASI makes. In support, it cites assumptions and practices from the general population, for example with respect to fishing and residency:

> Default assumptions that the general population consumes fish taken from contaminated water bodies every day and year of their entire life represent additional conservative assumptions…. While it is possible individuals could obtain 100 percent of their fish from a single waterbody, this is not typical unless the waterbody is very large or represents a highly desirable fishery. In addition, individuals are likely to move many times during their lifetimes and, as a result of those moves, may change their fishing locations and the sources of the fish they consume. Finally, it is likely that most anglers will not fish every year of their lives. Health issues and other demands, like work and family obligations, will likely result in no fishing activities or reduced fishing activities during certain periods of time that they live in a given area.[291]

NCASI concludes that agencies' standard practice of selecting conservative and protective values for the various parameters in the risk assessment equation (characterized, respectively, by uncertainty and variability), result in an estimate of risk that is inaccurate. "It is unlikely that this combination of assumptions is representative of the exposures and risks experienced by many, if any, individuals within the exposed population."[292] The case for probabilistic techniques such as "Monte

[290] *Id.* at 65-66.
[291] NCASI, RISK ASSESSMENT WHITE PAPER, *supra* note 279, at 22-23.
[292] *Id.* at 29.

Carlo" analysis similarly stems from an assumption that no one's actual circumstances of exposure are likely to be represented by a composite of high-end values; rather, we are all equally likely to be among the winners or the losers, as in a crap shoot at Monte Carlo. Thus, the argument goes, we should input distributions (rather than point estimates) for each parameter and then consider risk in terms of the probabilities – noticing, in particular, the low probability in the abstract that any individual will experience the high levels of risk associated with the upper end of a distribution for each parameter.[293]

However, this argument again would require us to deny what we know about fish consumption practices in Washington. We know that the fishing tribes here, as elsewhere in the Pacific Northwest, are comprised of actual people whose exposure *is* described by a composite of maxima: actual individuals do live in the same place, and harvest from the same locations, and consume relatively large quantities of fish per day, for an entire lifetime.[294] We have the identifying information that permits us to consider risk in terms of actualities, not probabilities.

Although not an exhaustive recitation, this account nonetheless affords a sense of recent experience in Washington and in the Pacific Northwest more generally with revising state water quality standards.[295] As the description above suggests, the arguments and strategies are several: delay issuance of a more protective FCR; denigrate the science

[293] *But cf.* EPA, EXPOSURE FACTORS HANDBOOK, *supra* note 239, at 1-17 to 1-18 (cautioning against the use of Monte Carlo techniques where the variables are not independent but dependent).

[294] Moreover, they are legally entitled to do so – a point taken up in the next Part, *infra* Part VII. And, indeed, many Indian people feel that they could not do otherwise. *See, e.g.,* Columbia River Inter-Tribal Fish Commission, Tribal Salmon Culture, *available at* http://www.critfc.org/salmon-culture/tribal-salmon-culture/ (last visited Apr. 20, 2013) ("Salmon and the rivers they use are a part of our sense of place. The Creator put us here where the salmon return. We are obliged to remain and to protect this place."); *see also* O'Neill, *Variable Justice*, *supra* note 10, at n.265 (quoting Margaret Palmer, Yakama tribal fisher).

[295] Indeed, many other issues and arguments have emerged during the process in Washington and elsewhere, some of which may have important implications for tribal rights and interests, e.g., arguments that sediments standards ought not be considered water quality standards within the meaning of the CWA. These are not considered here in the interest of managing the scope of this article.

that supports an updated FCR; dilute the impact of an increased FCR; distort the scientific data regarding species' behavior and sources of contamination; and deny that we know precisely who it is that is among the most highly-exposed – it is Indian people – and so who it is that will be burdened by calls for tolerating greater risk. In fact, while delay is considered here as a separate feature of the states' standard-setting efforts, it is worth remarking that each of the other tactics can have the advantage, from the perspective of those with anti-regulatory designs, of at least forestalling whatever protective revisions are ultimately secured.[296] Thus, even irrelevant arguments and poorly supported assertions can have the desired effect if agencies and members of the public feel they must take the time to respond on the merits.

The arguments canvassed in this Part are often familiar and many come from the standard anti-regulatory playbook.[297] Indeed, many of the examples offered by industry and other commenters are inapt precisely because they are taken from this general stock of arguments. Arguments that reference where and when "most anglers" harvest fish[298] or how frequently "individuals" move[299] or what quantities of geoduck one can "envision" consuming [300] are explicitly or implicitly grounded in assumptions that don't match practices in Washington, most notably, tribal members' practices.

However, the arguments have sometimes been crafted in a manner particular to the tribal context and disturbingly so. Thus, for example, while it is a standard anti-regulatory move to call for "sound science," and under this umbrella urge agencies to wait for further study (when delay would be advantageous), or to rely exclusively on one's favored studies,[301] the language in which criticisms of the tribally conducted surveys were

[296] *See generally* CATHERINE A. O'NEILL, ET AL., THE HUMAN AND ENVIRONMENTAL COSTS OF REGULATORY DELAY, CENTER FOR PROGRESSIVE REFORM WHITE PAPER #907 (Oct. 2009).
[297] *See, e.g.,* THOMAS O. MCGARITY, ET AL. SOPHISTICATED SABOTAGE: THE INTELLECTUAL GAMES USED TO SUBVERT RESPONSIBLE REGULATION (2004).
[298] *See* Pope Resources, *supra* note 255.
[299] *See* NCASI, RISK ASSESSMENT WHITE PAPER, *supra* note 279.
[300] *See* McCrone, *supra* note 246.
[301] *See, e.g.,* MCGARITY, ET AL., *supra* note 297, at chapter 2 "The Myth of 'Junk Science'" 31-65.

leveled sometimes echoed too closely the discriminatory standards that have been applied to tribal science and knowledge in the past.[302] To question the believability or veracity of tribal respondents and so critique the professionalism of tribal study authors and the credibility of their results, one ought proffer more evidence than a mere assertion that portrays tribal members' practices as different from those of the dominant society.[303] Recorded quantities of Indian people's fish intake aren't inaccurate simply because they don't square with the quantities non-Indians consume or could imagine people consuming.

Still, what is perhaps most remarkable about the way that the "fish consumption issue" has transpired in Washington, especially, is that the process and arguments have not been *more* different here, given the tribal context, than had this issue been debated elsewhere. That is to say, in Washington, despite an engaged and technically sophisticated tribal presence throughout (and, indeed, prior to) the state's efforts to revise its FCR and related environmental standards, the tribal context for the relevant state and federal agency decisions has often not been visible. Indeed, tribal leaders made this point in the strongest of terms in reaction to Ecology's announcement of its "revised" process in July of 2012.[304]

[302] *See, e.g.,* Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1152-58 (2012) (discussing history of various forms of epistemic injustice and how these have impaired Native peoples' rights, considering among these "testimonial injustice," which "arises when someone is wronged in his or her capacity as a knowledge giver" and may involve, for example, qualifying some speakers as capable or credible givers of testimony whereas others are excluded from such qualification based on their identity).

[303] *See generally* Robert A. Williams, Jr., *Columbus's Legacy: Law as an Institution of Racial Discrimination*, 8 ARIZ. J. INT'L & COMP. L. 51 (1991) (discussing history of colonization in United States and describing systemic discrimination based on cultural differences between European colonizers and Indigenous peoples in which real or perceived cultural differences are highlighted, and the colonizers' practices privileged whereas the Indigenous practices are portrayed as deficient).

[304] Letter from Babtist Paul Lumley, Executive Director, Columbia Inter-Tribal Fish Commission, to Dennis McLerran, Regional Administrator, Environmental Protection Agency, Region X (Sept. 14, 2012); Letter from Frances G. Charles, Chairperson, Lower Elwha Klallam Tribe, to Dennis McLerran, Regional Administrator, Environmental Protection Agency, Region X (Sept. 7, 2012); Letter from Merle Jefferson, Executive Director, Lummi Nation Natural Resources Department, to Ted Sturdevant, Director, Department of Ecology (Oct. 18, 2012); Letter from Billy Frank, Jr., Chairman, Northwest Indian Fisheries Commission, to Dennis McLerran, Regional Administrator,

Tribal leaders underscored their disappointment with the substantive results of Washington's process to date by declining the invitation to sit at the table with other invited "stakeholders" as part of Washington's new round of process. Instead, tribes insisted that any future exchange be conducted on a government-to-government basis.

Although the fish consumption issue profoundly affects tribes' rights and interests, the implications of tribes' unique status and rights are often not engaged. In the next Part, I turn attention to this last point, and explore how the debate ought to have been (and ought, in the future, to be) different, were the agencies and other participants to take more seriously their obligations as successors to the treaties and apply more thoroughly the reasoning of the culverts and other decisions by which the U.S. courts have affirmed these obligations.

VII. ENVIRONMENTAL DECISIONS IN THE TRIBAL CONTEXT

Given the tribal context that permeates environmental regulatory decisions by Washington and other states in the Pacific Northwest, one would expect a different process and a different result than that witnessed to date. In view of the legal constraints imposed by the treaties and other sources of law, state and federal agencies may not in fact be free to entertain arguments or permit tactics that might be plausible were only non-tribal populations affected – were the entire landscape not imprinted with a prior suite of rights reserved by its first peoples. Thus, whether the

Environmental Protection Agency, Region X (Aug. 24, 2012); Letter from Jeromy Sullivan, Chairman, Port Gamble S'Klallam Tribe, to Ted Sturdevant, Director, Department of Ecology (Oct. 12, 2012); Letter from Rudy Peone, Chairman, Spokane Tribal Business Council, to Ted Sturdevant, Director, Department of Ecology (Oct. 15, 2012); Letter from David Lopeman, Chairman, Squaxin Island Tribe, to Dennis McLerran, Regional Administrator, Environmental Protection Agency, Region X (Sept. 13, 2012); Letter from Leonard Forsman, Chairman, Suquamish Tribe, to Ted Sturdevant, Director, Department of Ecology (Oct. 19, 2012); Letter from M. Brian Cladoosby, Chairman, Swinomish Indian Tribal Community, to Dennis McLerran, Regional Administrator, Environmental Protection Agency, Region X (Aug. 24, 2012); Letter from Terry Williams, Commissioner, Fisheries and Resources, The Tulalip Tribes, to Dennis McLerran, Regional Administrator, Environmental Protection Agency, Region X (Sept. 18, 2012); Letter from Harry Smiskin, Chair, Yakama Nation Tribal Council, to Ted Sturdevant, Director, Department of Ecology (Oct. 3, 2012).

benchmarks and hammers built into the CWA can appropriately be ignored elsewhere, whether aspirations for the future of aquatic environments ought generally be measured by fish intake and resource use in a degraded present, these questions must be differently engaged where the answers affect tribes' rights and interests. Given that tribes' rights to fish were reserved throughout the Pacific Northwest, and given the interpretation that these rights have been given by U.S. courts, agencies' work here should be different. This Part examines more closely how the particulars of courts' interpretations in the relevant cases speak to the environmental decisions at hand.

A. Tribes' Fishing Rights and Their Implications for Environmental Standard Setting

First, the treaties guaranteed a source of food, forever; as such they promise fish fit for human consumption. As Judge Martinez emphasized in the culverts case, a central concern for the Indians during the treaty negotiations was the survival, health, and well-being of their generations to come. Their expressed worry about their ability to fish once they ceded so much territory was an apprehension about a constrained future – a future in which they might be thwarted in their lifeways by an influx of settlers. "The question," as Judge Martinez noted, "was not whether they could now feed themselves, but rather whether in the future after the huge cessions that the treaties proposed the Indians would still be able to feed themselves."[305] But these apprehensions were met with promises by the U.S. that the Indians could continue to take fish at all of their places, including those off-reservation, and that their people would retain this source of subsistence and the means of earning a livelihood in perpetuity. It was this guarantee of a right with future force and vitality that persuaded the Indians to sign. In framing his holding, Judge Martinez emphasized the reliability, abundance, and practical function of the fish resource, citing the "significance" of "the right to *take* fish, not just the right to fish," to the tribes, the "[t]ribes' reliance on the unchanging nature of that right," and the assumption by all parties that the

[305] Culverts Order, 2007 WL 2437166 at *9 (W.D. Wash.).

Indians' "cherished fisheries would remain robust forever" as a source of food and commerce.[306]

This concern for what might be termed a functional aspect of the treaty guarantees – the point that one of the ends of harvesting fish is, ultimately, consuming fish – has been recognized by other courts as well. For example, in interpreting a similar fishing clause in treaties between the Great Lakes tribes and the U.S., a district court in Wisconsin observed that the treaties guaranteed to the tribes the right to make a living "off the land and from the waters … by engaging in hunting, fishing, and gathering as they had in the past and by consuming the fruits of that hunting, fishing, and gathering, or by trading the fruits of that activity."[307] The Indians were not and are not "catch-and-release" fishers. This is not to downplay the importance of the other facets of fish and fishing and all of the lifeways that are bound up with the fish. It is simply to recognize that the point of securing a "robust" fishery, from the tribes' perspectives, is not to have salmon runs to marvel at from a distance. Thus, while the culverts case dealt with facts presenting impairment of the tribes' rights via depletion of the fish resource, its rationale applies equally to impairment of the tribes' rights via contamination that renders the fish resource unfit as a source of food for tribal fishers, their families, and others to whom they might sell their catch. Moreover, as noted in Part III, many of the same toxicants that lead to contamination of the fish tissue *also* cause depletion of fish numbers, given their adverse effects on reproductive success and other essential behaviors for many species.

Second, the treaty promises create obligations that exist in perpetuity. In finding the duty on the part of the State of Washington in the culverts case, Judge Martinez stated that he was guided by earlier

[306] *Id.* at *7-*9.

[307] Thus, for example, in interpreting 1837 and 1842 treaties with the Chippewas, the district court explained that, by dint of the treaties, the tribes were "guaranteed the right to make a moderate living off the land and from the waters in and abutting the ceded territory and throughout that territory by engaging in hunting, fishing, and gathering as they had in the past and by consuming the fruits of that hunting, fishing, and gathering, or by trading the fruits of that activity for goods they could use and consume in realizing that moderate living." Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1426 (W.D. Wis. 1987).

decisions in which courts had recognized that the promises that the treaties would protect the fish as a "source of food and commerce" could be undermined in practice by "future settlers." Judge Martinez, like judges before him, understood that the Indians' rights could be rendered a nullity were settlement permitted literally or figuratively to "crowd the Indians out" of the meaningful exercise of their rights – that fish-blocking culverts could undermine the right by impairing the resource on which the right depends. In his March 2013 decision, Judge Martinez emphasized that the treaties "were negotiated and signed by the parties on the understanding and expectation" that "the salmon would remain abundant forever" to support tribal harvest for the generations to come, but observed that, instead, the salmon stocks "have declined alarmingly since treaty times."[308] He found that "[a] primary cause of this decline is habitat degradation" and "one cause of the degradation of salmon habitat is blocked culverts."[309] While Judge Martinez' ruling pertained only to this artifact of settlement, its logic was of a piece with other cases in which courts have recognized that the settlers' dams, development, and industry could effectively undercut the perpetual nature of the treaty guarantees.[310]

Moreover, the fact that tribes have been prevented from fully exercising their right to take fish in the intervening period since the treaties were signed doesn't limit their right to do so in the future. In granting the permanent injunction requested by the tribes in the culverts case, Judge Martinez catalogued "the human caused factors that have greatly reduced the salmon available for tribal harvest" and noted that "[m]any members of

[308] Culverts Decision, No. 9213RSM, Subproceeding 01-1, slip op. at 32 (W.D. Wash. 2013).
[309] *Id.*
[310] *See* Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032 (9th Cir. 1985) (upholding district court's order, in response to Yakama Nation challenge, of measures to protect eggs in salmon nests in Yakima River from adverse effects of dewatering occasioned by management of Cle Elum dam); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D. Or. 1977) (finding that a proposed dam on Catherine Creek would infringe rights guaranteed to the Umatilla tribe); No Oilport! v. Carter, 520 F. Supp. 334, 372-73 (W.D. Wash. 1980) (finding that sedimentation from proposed pipeline crossing Puget Sound and two rivers subject to treaty rights could adversely affect salmon and ordering evidentiary hearing to determine whether habitat would be "degraded such that rearing or production potential of the fish will be impaired or the size or quality of the run diminished");

the Tribes would engage in more commercial and subsistence salmon fisheries if more fish were available." [311] Relatedly, courts have consistently rejected attempts to construe alterations to the land and resulting changed circumstances to the disadvantage of tribal rights. Rather, they have found that the rights secured to the tribes by treaty are permanent, such that "[t]he passage of time and the changed conditions affecting the water courses and the fishery resources in the case area have not eroded and cannot erode the right secured by the treaties . . ."[312]

Third, the treaties reserved a means for ensuring tribes' survival and well-being in a changing world; they presumed resilience, not stasis. To this end, courts have held that tribal members are not restricted in their harvest to a particular mix of species, whether a mix taken in the past or in contemporary times. Rather, the right to take fish secured by the treaties is a right "without any species limitation."[313] As the court in the Rafeedie decision explained, "[at treaty] time,... the Tribes had the absolute right to harvest any species they desired, consistent with their aboriginal title.... The fact that some species were not taken before treaty time - either because they were inaccessible or the Indians chose not to take them - does not mean that their *right* to take such fish was limited." [314] Subsequent courts have continued to reject attempts to cabin tribes' fishing rights by excluding certain species argued not to have been harvested historically.[315] Tribes' rights cannot be thus pinned down.

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[311] Culverts Decision, slip op. at 4-5.
[312] United States v. Washington, 384 F. Supp. 312, 401 (W.D. Wash. 1974); *see also,* United States v. Oregon, 2008 WL 3834169 (D. Or. 2008) (holding that the "Wenatchi and Yakama have joint fishing rights to fish at the Wenatshapam Fishery, which is located at the confluence of the Wenatchee River and Icicle Creek. Due to the alteration of this site by white settlement, and the fact that the evidence demonstrates fishing on Icicle Creek, in addition to fishing on the Wenatchee River, the nearest location for the Wenatshapam Fishery is the Leavenworth National Fish Hatchery on Icicle Creek").
[313] United States v. Washington, 873 F. Supp. 1422, 1430 (W.D. Wash. 1994) (emphasis in original).
[314] *Id.* (emphasis in original).
[315] *See, e.g.,* Midwater Trawlers Co-operative v. Department of Commerce, 282 F.3d 710 (9th Cir. 2002) (rejecting challenge to allocation of Pacific whiting fish to coastal tribes on grounds that they had not fished for whiting at the time of the treaties, stating "the term "fish" as used in the Stevens Treaties encompassed all species of fish, without exclusion and without requiring specific proof").

Fourth, the treaty guarantees exist in theory and in practice; as such, courts interpreting the treaties have been sensitive to the potential for evisceration of the right by governmental inaction or delay. In the culverts case, the court addressed facts showing that the State of Washington had neglected properly to build and maintain culverts, with the result that spawning habitat would be blocked and salmon numbers decreased. The State of Washington responded to the tribes' request for a determination as to a treaty-based duty by arguing that it was in fact in the process of addressing its stream-blocking culverts. Evidence before the court showed that the state's progress, however, was agonizingly slow: according to the state's projections, it could take "about 100 years" for the culverts to be fixed.[316] The fact that Judge Martinez was not persuaded by this tack and ultimately saw fit to require "[s]tate action in the form of acceleration of barrier correction"[317] suggests a sensitivity on the part of the courts to the very real possibility that the treaty right to take fish could be rendered a nullity if the habitat on which the fish depend is permitted to be degraded while a state delays. In other cases, too, courts have appreciated that governmental inaction could undermine tribal exercise of their rights as a practical matter, for example, recognizing that a state that declined to regulate harvest by non-tribal fishers in the oceans and bays would have the effect of leaving no salmon to complete their journey to tribal fishers in the rivers.[318]

[316] United States v. Washington, subproceeding 01-01, State of Washington's First Amended Answer and Counter Requests for Determination (Revised 2004) 2004 WL 4005685 (W.D. Wash.) (admitting this figure and suggesting that shorter timelines would also be possible, depending on funding from the legislature).

[317] Culverts Decision, No. 9213RSM, Subproceeding 01-1, slip op. at 34 (W.D. Wash. 2013). The court found that "[a]n injunction is necessary to ensure that the State will act expeditiously in correcting the barrier culverts which violate the Treaty promises. The reduced effort by the State over the past three years, resulting in a net increase in the number of barrier culverts in the Case Area, demonstrates that injunctive relief is required at this time to remedy Treaty violations." *Id.* at 35.

[318] United States v. Washington, 384 F. Supp. 312, 344-47 (W.D. Wash.) (recognizing the factual evidence that "substantial numbers of fish, many of which might otherwise reach the usual and accustomed fishing places of the treaty tribes, are caught in marine areas closely adjacent to and within the state of Washington, primarily by non-treaty right fishermen. These catches reduce to a significant but not specifically determinable extent the number of fish available for harvest by treaty right fishermen…. while it must be recognized that these large harvests by non-treaty fishermen cannot be regulated with

Taken together, these features of tribes' rights have implications for the various arguments and tactics encountered in Washington and elsewhere in the Pacific Northwest, outlined in the previous Part. Specifically, they mean that many arguments that might at least be considered as a more general matter, i.e., were the fishing tribes' rights and interests not at stake, become untenable here.

As noted at the outset of this article, every day that federal and state agencies permit a 6.5 g/day-driven standard to remain in force, they leave in place a *de facto* ceiling on safe fish consumption. These agencies thereby condition tribal members' exercise of their right to take fish – to harvest and consume the fruits of that harvest – in excess of this amount on their "willingness" to also take in toxicants at levels that have been deemed hazardous and unacceptable by these agencies.[319] That is, once tribal members eat more than twelve fish meals a year, they do so at their peril. I have argued elsewhere that risk avoidance is a misconceived regulatory response as a general matter; fish consumption advisories are not the answer. But in the tribal context, it is not merely a matter of being good or bad policy. Tribes reserved a right to take fish – fish fit for human consumption – not a right to be faced with a false "choice" of consuming fish with a stiff dose of carcinogens or curtailing their fish consumption and all that this would mean.

The fish consumption rate is an input to a method – quantitative risk assessment – used to determine the future state of the aquatic environment and all its components. The output of the method is a determination of the level of contaminants we will permit to be released to or remain in our waters and sediments. We could assess (and some commenters would have us assess) exposure on a bite-by-bite basis –

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any certainty or precision by the state defendants, it is incumbent upon such defendants to take all appropriate steps within their actual abilities to assure as nearly as possible an equal sharing of the opportunity for treaty and non-treaty fishermen to harvest every species of fish," and setting forth method for determining each group's "harvestable portions" accordingly).

[319] Recall that a woman consuming walleye from the Umatilla River at contemporary levels documented by the CRITFC survey (i.e., at 389 g/day) is exposed to methylmercury at a level nearly ten times EPA's "reference dose," that is, the level it has deemed safe for humans. *See* discussion, *supra* note 117 and accompanying text.

ascertaining precisely how much of which species, containing which contaminants with which bioaccumulation factors people currently consume – but the FCR, like other exposure parameters, is merely an input. It allows us to reach the end of setting an environmental standard, but it is not an end in itself. Thus, the FCR and other exposure parameters can be used to measure (ever more precisely) present practice, but there is a separate question whether present practice is representative of future practice. Given that risk-based standards determine future conditions for our waters, standards founded on present practice *in fact will be* predictive of future practice. That is, they will set the ceiling for safe consumption for the future. If the FCR is too low, if it is diluted by applying a diet fraction, if it is reduced by excluding certain species (including salmon) – if any or all of these devices are enlisted – the future health of our aquatic ecosystems will be limited accordingly. Again, whether this is an appropriate approach for some place where tribal fishing rights are not affected, it is not appropriate here. For the fishing tribes, the rights to use the fishery resource that they reserved constitutes the appropriate "baseline,"[320] and suggests the environmental conditions necessary to support that baseline. An unsuppressed tribal FCR is a way to accomplish this, the input that, along with other appropriate assumptions, allows one to derive environmental standards that ensure future conditions equivalent to those reserved. Assumptions in the other direction, conversely, guarantee that future conditions will be degraded relative to this baseline, and allow future settlers, with their PCBs and PAHs, to crowd the Indians out of the meaningful exercise of their fishing rights.

The implications of tribes' treaty-secured rights for some of the approaches and arguments encountered in the Pacific Northwest are explored in greater detail in the following three subsections.

[320] The term "baseline" is used here as Harper, et al. use the term to refer to how resources were used before degradation and contamination and how they "will be used again in fully traditional ways after cleanup and restoration." *See* Harper, et al., *Subsistence Exposure Scenarios*, *supra* note 152 and accompanying text.

1. Asking the Wrong Question

As the tribes have argued, it is tribes' unsuppressed, historical or "heritage" practices and fish consumption rates that they reserved in the treaties and other agreements. Yet state and federal agencies' focus on contemporary, suppressed consumption rates tethers tribal members to practices that reflect a legacy of non-tribal governments' actions in contravention of the treaties. As noted above, consumption rates derived from studies of present consumption capture a snapshot of practices that have been shaped by intimidation, denial of access to fishing places, depletion and contamination of fishery resource. Environmental standards set by reference to suppressed rates will ensure aquatic environments that in the future will support no better than suppressed rates.

Thus industry commenters miss the mark when they suggest that tribal members' current consumption and other practices necessarily impose a limit on their future practices. Boeing, for example, takes Ecology to task for failing to indicate the portion of tribal populations that "live on or near reservations" or that "live lifestyles comparable to the subsistence lifestyles described in some of the published surveys."[321] Boeing argues that this information is relevant because "[i]t seems likely that American Indians and Alaskan natives who live away from reservations may eat a larger proportion of fish that is not locally raised or harvested, particularly if they live in urban areas."[322] Having argued that non-locally raised or harvested fish should be excluded from Ecology's FCR, the implications of this information are clear.[323] But the point is not to zoom in ever more tightly on individual tribal members' practices as revealed by a contemporary snapshot. The point, in view of the treaties, is to ask: to what practices are tribes entitled in the future – the future provided for by tribal negotiators at treaty time?

We ask the wrong question when we gauge environmental standards that determine the future health of our waters to practices constrained by the present, contaminated state of our waters. The future

[321] Boeing, FCR TSD 2.0 Comments, *supra* note 222, at 13.
[322] *Id.*
[323] *Id.* at 4-6.

condition of Washington waters, indeed, is now determined by reference to the amount of fish people across the nation ate in 1973-74 – when the lakes were dead, the rivers were on fire, the fish depleted and contaminated, and tribal harvest still under open attack. Because we set risk-based standards based on assumptions about exposure measured in this bleak period, we aim for a future that is not improved. That is, we impose a limit on the health of our waters – and a ceiling on the safe consumption of fish from those waters – that reflects not a level of fish intake that is healthful or to which tribes are entitled, but a level that is simply equal to present, constrained practice.

Ecology has, to its credit, acknowledged the problem of suppression in the tribal context, but it has not discussed how it might account for suppression effects in practice.[324] The relevant EPA guidance, it should be noted, does not preclude a future-oriented exposure assessment.[325] Rather, it observes that such assessments may be past-, present-, or future-oriented. Given the CWA's restorative aspirations, it makes sense that exposure analysis is oriented toward a future in which aquatic ecosystems are healthy and whole. And, given the tribal context, it is arguable that exposure analysis not only may but must be oriented toward a future in which the fish resource is robust and tribal members may exercise fully their right to take fish.

Tribes and tribal researchers are leading the way in operationalizing these insights and reframing the question to reflect more closely the future secured by the treaties. Tribes have conducted fish consumption surveys that seek to identify and address suppression effects. For example, studies by the Suquamish, Swinomish, and Lummi

[324] Ecology, FCR TSD, *supra* note 149, at 96, 107-08.
[325] EPA, EXPOSURE ASSESSMENT GUIDELINES, *supra* note 143, at 72, 74-75 (describing among the uses of exposure scenarios in risk-based environmental standard setting, "exposure scenarios can often help risk managers make estimates of the potential impact of possible control actions. This is usually done by changing the assumptions in the exposure scenario to the conditions as they would exist after the contemplated action is implemented, and reassessing the exposure and risk" and pointing out that "if the [exposure] scenario being evaluated is a possible future use or post-control scenario, an assessor must make assumptions in order to estimate what the [exposure] distribution would look like … if the possible future use becomes a reality.").

tribes have all sought to document the forces of suppression.[326] The Lummi Nation, further, in a survey published in 2012, measured consumption as of 1985, which was "the peak fish harvest year for the Lummi Nation in recent history."[327] Thus, "[w]hile not at Treaty-time levels, seafood abundance and availability was less of a limiting factor for seafood consumption during 1985 than in 2012. Consequently, the seafood consumption rate would be less suppressed due to environmental degradation or the lack of available fish."[328] The study documented an average consumption rate at 383 g/day, a 90th percentile consumption rate at 800 g/day, and a 95th percentile consumption rate at 918 g/day.[329] The study notes that it expects the results of this survey to inform an update of the Lummi Nation's water quality standards, as well as Washington's water quality and sediment management standards, which affect the waters of the Lummi Nation's usual and accustomed fishing areas and thus the health of tribal members.[330]

Tribes and tribal researchers have also developed methods that have reframed exposure assessments to focus on practices that are healthful, that are in accordance with historical or heritage practices, and to which tribes are entitled under the treaties, and have adopted environmental standards founded upon these methods. For example, as noted above, Barbara Harper, Stuart Harris, Darren Ranco, Anna Harding, and their colleagues have outlined a method for developing tribal exposure scenarios that consider exposure in view of a healthful future, rather than a degraded present.[331] Exposure assumptions to be used in

[326] *See, e.g.,* SUQUAMISH TRIBE, FISH CONSUMPTION SURVEY, *supra* note 13, at 53-54; Donatuto & Harper, *supra* note 14; LUMMI NATION SEAFOOD CONSUMPTION STUDY, *supra* note 15, at 1-2, 11-14.
[327] LUMMI NATION SEAFOOD CONSUMPTION STUDY, *supra* note 15, at 1.
[328] *Id.* This baseline year was chosen for study as well because it would permit reliable estimates of fish consumption, given the availability of data on seafood abundance, as fishery data for 1985 are "well documented," and given that meaningful data "could be elicited in recall studies that reach back 25 years." *Id.* at 1, 11-14.
[329] *Id.* at 2.
[330] *Id.* at 7.
[331] Harper, et al., *Subsistence Exposure Scenarios*, *supra* note 152; *see also* BARBARA HARPER & DARREN RANCO, WABANAKI TRADITIONAL CULTURAL LIFEWAYS EXPOSURE SCENARIO (2009), BARBARA L. HARPER, ET AL., TRADITIONAL TRIBAL SUBSISTENCE EXPOSURE SCENARIO AND RISK ASSESSMENT GUIDANCE MANUAL (2007).

risk-based standards follow from practices in accord with this scenario. The Spokane Tribe has adopted WQS that use a FCR of 865 g/day, supported by a tribal exposure scenario developed according to such methods.[332]

Tribes have also worked to develop alternatives to risk-based approaches to environmental standard-setting. The Swinomish tribe, for example, is leading an effort to elaborate a "health and well-being"-based approach.[333]

2. Cabining Treaty-Secured Rights

Relatedly, arguments that attempt to pin tribal practice to currently available species or currently accessible or suitable habitat are a move in the opposite direction to the treaty promises. Arguments for a diet fraction and arguments for a site use factor take as a baseline currently constrained practice and operate to ensure a future in which present constraints will serve as the measure of our waters' future ability to support the fish. Thus, a host of the arguments canvassed in the preceding Part have no place in Ecology's deliberations.

First, while tribes at present obtain most or all of their fish from local sources, it is crucial to note that at treaty time, Indian people obtained *all* of their fish from local waters. And tribes' reserved rights under the treaties and other legal agreements entitle them to do so in perpetuity. So even if tribal members at the time of a contemporary survey obtained 25% of their fish intake from non-local sources, it would not be appropriate to apply a diet fraction of 0.75 to the FCR and thereby place a limit on future consumption of locally harvested fish at more robust levels. As the Suquamish, Swinomish, and Lummi surveys document, many tribal members *would like to consume more fish and shellfish*, were these resources not depleted or contaminated, were they better able to access

[332] Spokane Tribe of Indians, Surface Water Quality Standards, RESOLUTION 2010-173 at § 6(6) (2010) ("aquatic organism consumption rate" of 865 g/day).
[333] Swinomish Indian Tribal Community, "Key Indicators of Tribal Human Health in Relation to the Salish Sea," Prepared in fulfillment to Swinomish Action Agenda Goal 4, Objective 1 for EPA grant #981-90-03-00 in coordination with the Puget Sound Partnership (2010).

and harvest the resources, were they not still recovering from the legacy of illegal restrictions on their fishing and confiscations of their boats and gear. This point was echoed by Judge Martinez in the March 2013 culverts decision. Tribes envision and have worked toward a future in which the ecosystems that support fish are restored to health, and the fish resource is returned to abundance. Thus, even if tribal members currently obtain less than 100% of their diet from regulated waters, they have not only the potential, but also the expressed desire, intention, and right to do so in the future. To apply a diet fraction is to assume and ensure that future generations will not be able to look to local waters for their fish. This is not the future that tribal negotiators understood themselves to be securing.

Second, tribes' rights are not limited to certain mixes of species consumed historically or at present: these rights encompass all species of fish. So, while a survey of contemporary tribal fish consumption practices may document a particular proportion of species consumed (e.g., in the hypothetical example above, of the 75 g/day of locally-harvested fish, 50 g/day salmon and 25 g/day other finfish and shellfish), tribal members are not in any sense bound to consume this mix of species in the future. Rather, to use the terminology of EPA Region X, tribal members are free to undertake "resource switching."[334] Yet industry has called for – and Ecology's draft SMS guidance appears to anticipate -- slicing and dicing, even down to the level of species-specific fish consumption rates, based on contemporary consumption patterns. This approach is at odds with tribes' rights to determine the mix of species that will comprise their dietary intake in the future. A dearth of a particular species today ought not be used to compromise an aquatic environment's ability to support that species or other species tomorrow.

Third, even in cases where an individual's fish intake can only partially be supported by productivity (current and future) of resources affected by a contaminated water body or site, the application of a diet fraction is problematic. Again, consider a hypothetical tribal member whose total FCR is 100 g/day. Assume that he obtains (or would obtain)

[334] EPA REGION X, FRAMEWORK, *supra* note 240, at 9.

all of his fish from local sources, within his tribe's adjudicated U&A area. Assume further that Site A is a small lake that, even if pristine, is only likely to support productivity of fish sufficient to supply 50 g/day. Application of the diet fraction concept would result in environmental standards (e.g., a sediment cleanup level) that permitted fish at Site A to harbor twice the level of toxic contaminants, on the theory that this individual would only ever obtain half of his fish diet from the lake at Site A. But this calculus does not consider the remaining 50 g/day of fish comprising this man's diet. Suppose he obtains it from a nearby bay, Site B, which is also within his tribe's U&A area. The calculus for Site A means either that Site B must be cleaned up to a level twice as protective as would otherwise be required (presumably, simply because Site B is batting second) or, if the same logic is applied to Site B, that our hypothetical individual would be left exposed to *twice* the level of contaminants that would otherwise be healthful. It is telling that Ecology's proposed SMS guidance mentions only that the diet fraction may be "reduced" (as to Site A), but does not mention that it may be increased (as to Site B). And, it nowhere provides for consideration of aggregate risk. Moreover, the aggregate effect of applying a diet fraction and/or a site use factor at multiple sites that provide habitat for fish and shellfish at their various lifestages may lead to depletion and contamination of resources to which tribes have treaty-secured and other rights. Thus, for example, while Dungeness crab or pacific herring or salmon may be present at or affected by contaminants from Site A at one point in their respective lifecycles, they may be present at or affected by Site B at another point in their development. If the calculation of risk at each site excludes or steeply discounts its contribution to the contaminants harbored by the various species, the resulting standards will be overly permissive of toxic contamination.

3. Delaying Standards, Undermining Rights

If the watersheds are degraded, so that the fish are too few or too contaminated for tribal people to harvest and consume, tribes' treaty-secured rights to take fish are eviscerated as surely as if tribal fishers were hauled from their boats or tribal harvesters barricaded from the beaches. Under the CWA and other laws, state and federal environmental

agencies set the terms for permissible degradation. To delay enacting standards that limit permissible toxicants in our waters to healthful amounts is, of course, to allow harmful levels to remain. The contaminant levels, for example, in the Columbia River Basin currently burden tribal consumption (at even contemporary rates) with several orders of magnitude greater cancer risk than is generally deemed acceptable or several times the levels of methylmercury thought to be "safe" from neurodevelopmental damage. Such inaction and delay by the agencies charged with addressing these habitat- and resource-degrading conditions is analogous to the inaction and delay that the culverts court found problematic under the treaties.

Yet, the presence of treaty-secured and other tribal rights seems not to have lit a fire under the EPA or the states in the Pacific Northwest. Instead, the states and EPA have failed to invoke their authorities, have reneged on executive and other commitments, and have even ignored mandatory statutory and other obligations, as canvassed in the preceding Part. The states and EPA have "danced" their way around the CWA.[335] Whether by issuing final WQS that cannot be approved (and then going back to the drawing board), or by rehashing the supporting science, or by repeatedly "kicking the can down the road,"[336] states have created – and EPA has sanctioned – a blueprint for evading the CWA's benchmarks and deadlines for water quality standards. The EPA's unwillingness to exercise the hammer of its own 303(c)(4) authority similarly deserves reproach, not only for its substantive effect on the ground but also for the message that this cavalier treatment of its obligation to uphold the purpose of the CWA sends to the states. This provision is no dead letter: EPA has acted under this obligation in the past in the face of states' (including

[335] The reference is to EPA Regional Administrator Dennis McLerran's description of the process for updating states' WQS in the Pacific Northwest, quoted in Columbia Basin Fish & Wildlife News Bulletin, *supra* note 233, and discussed in the accompanying text.
[336] Letter from M. Brian Cladoosby, Chairman, Swinomish Indian Tribal Community, *supra* note 304 (expressing "deep disappointment" with Ecology's "abrupt change of course [as announced in July, 2012] which effectively stalls all progress," including years of research and discussion, and chiding Ecology for "kick[ing] the can down the road by adding yet another lengthy planning process" before the FCR is updated in the state's water quality and sediments rules).

Washington's) recalcitrance, by adopting the National Toxics Rule.[337] And EPA has options at hand. As the Kalispel tribe recently pointed out in the context of Idaho's ongoing efforts to revise its WQS, as of 2000 the EPA could easily have enacted WQS using its national subsistence default FCR of 142.4 g/day to serve as a placeholder in the interim while states here dithered.[338] EPA's posture in the Pacific Northwest is particularly troubling given its obligations as federal trustee.

In short, it is difficult to imagine a clearer confluence of statutory directive, scientific support, and treaty-based duty. Yet the months and years go by, while state agencies and EPA stand by, and the fish resource is allowed to be rendered an unfit source of food.

Given proper consideration, tribes' treaty-secured and other rights have implications for the various arguments and approaches that have emerged in the Pacific Northwest. If these rights are to be honored and healthy fisheries restored, the regulatory question ultimately needs to be reframed. If these rights are not to be cabined, arguments for diet fractions and species exclusions ought to be eliminated from the table as non-starters. If these rights are not to be eviscerated through inaction, state and federal agencies at least cannot ignore the CWA's deadlines and authorities. While there are science and policy questions to be grappled with, the answers cannot be permitted to eviscerate tribes' treaty rights through the back door. Here, it will be important to recognize the

[337] *See, e.g.,* EPA, National Toxics Rule, *supra* note 18, 57 Fed. Reg. at 60,852 ("The CWA allows some flexibility and differences among States in their adopted and approved water quality standards, but it was not designed to reward inaction …The CWA authorizes EPA to promulgate standards where necessary to meet the requirements of the Act. Where States have not satisfied the CWA requirement to adopt water quality standards for toxic pollutants, which was re-emphasized by Congress in 1987, it is imperative that EPA act.").

[338] Letter from Deane Osterman, Executive Director, Kalispel Natural Resources Department, to Mary Lou Soscia, Columbia River Coordinator, U.S. Environmental Protection Agency (Jan. 9, 2013) (setting forth concerns with further delay that will result from Idaho's process, which includes conducting a new fish consumption survey, and suggesting that EPA has had a ready solution in the form of a placeholder at the subsistence default of 142.4 g/day since 2000). This is an approach, note, that some tribes have taken. The Lummi Nation, for example, has employed the 142.4 g/day default FCR while working on the fish consumption survey that will support more protective standards. See *supra* note 15 and accompanying text.

legal status of the various instructions that inform agencies' work. Guidance, for example, is merely guidance. As the EPA states at the outset of its *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*, this guidance "does not impose legally-binding requirements … and may not apply to a particular situation based upon the circumstances."[339] The treaties, by contrast, are the supreme law of the land.

B. Taking Seriously Our Obligations as Successors to the Treaties

We are all successors to the treaties. As Billy Frank, Jr., has pointed out, we have had no trouble in honoring some facets of the treaty promises – namely, the United States and successors on its side have retained the vast ceded territory as a home for white settlement.[340] But we should also ask how we can live up to *all* of our duties under the treaties, given our respective roles and authorities. The answers to this question should be crafted together, with tribal governments and non-tribal governments engaged side by side. Rob Williams has explained that the treaties, from the perspectives of Native peoples, are revered as sovereign compacts of alliance, as charters for respectful co-existence on this continent.[341] This understanding might usefully inform environmental decision making in the tribal context, where tribal and non-tribal agencies' work affects our shared aquatic ecosystems. Given that so many of the decisions impacting the vitality of the treaty resource are today in the

[339] EPA, AWQC METHODOLOGY, *supra* note 141, at ii.
[340] NWIFC, TREATY RIGHTS AT RISK, *supra* note 85, at 6 (quoting Billy Frank, Jr., Chairman, Northwest Indian Fisheries Commission: "We kept our word when we ceded all of western Washington to the United States, and we expect the United States to keep its word"); *see also* Billy Frank, Jr., Northwest Indian Fisheries Commission, "Being Frank: Time Moves On, But Treaties Remain," (Mar. 22, 2007), *available at* http://nwifc.org/2007/03/being-frank-time-moves-on-but-treaties-remain/ (last visited Apr. 20, 2013) ("People forget that non-Indians in western Washington have treaty rights, too. Treaties opened the door to statehood. Without them, non-Indians would have no legal right to buy property, build homes or even operate businesses on the millions of acres tribes ceded to the federal government").
[341] ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1997).

hands of non-tribal governments, there is a particular onus on them to take more seriously their obligations as successors to the treaty promises.

While the states and EPA should thus work together with their tribal partners to chart a path that honors the treaties and other agreements, some lessons might be gleaned from experience to date in the Pacific Northwest.

First, deliberations should be structured in a manner that recognizes tribes' unique political and legal status and rights. This is a matter of both form (i.e., process) and substance. Tribes' governmental status is now frequently acknowledged by state and federal agencies, and this has been true for the states and EPA in the Pacific Northwest. Yet in many ways, tribes' rights and the particular obligations that flow from these rights often do not *structure* the dialogue; rather, when tribal fishing rights are mentioned by the agencies, it may be as an afterword or a subsidiary consideration. Thus, for example, Ecology recently commenced a "WQS Policy Forum," which is the series of public meetings at which science, policy, and legal issues surrounding its revisions to its WQS and the FCR will be debated.[342] This process, recall, is now the first place in which an updated FCR will be considered for official adoption by rule in Washington. According to its draft agenda, the issue of "tribal treaty rights" is not slated for discussion until the seventh (and final) meeting, where it is one among several topics.[343] Yet important questions on which the existence of tribal treaty rights bear will have been discussed in the six prior meetings.[344] The tribes, as noted above, opted to decline participation in this Forum and to engage further discussions with Ecology on a government-to-government basis. But Ecology is not thereby relieved of a need to structure appropriately the dialogue among

[342] Washington Department of Ecology, "Water Quality Policy Forum and Delegate's [sic] Table," *available at* http://www.ecy.wa.gov/programs/wq/swqs/hhcpolicyforum.html (last visited Apr. 20, 2013).
[343] Washington Department of Ecology, *Surface Water Quality Standards Delegate's [sic] Table and Policy Forum: Draft Agendas for Future Policy Forums* (undated document), *available at* http://www.ecy.wa.gov/programs/wq/swqs/PolicyForumOverview.pdf (last visited Apr. 20, 2013).
[344] *Id.* (listing, for example, risk levels; exposure assumptions including exposure duration; and sources of fish and contaminants (i.e., considerations relevant to application of a diet fraction and/or site use factor)).

stakeholders and the public. By contrast, the second attempt at revising Oregon's FCR, which produced WQS that were not only approvable by EPA but that rest on the most protective FCR (175 g/day) of any state, was framed by a process with a tri-governmental lead, namely, the Confederated Tribes of the Umatilla Indian Reservation, the EPA, and ODEQ. Tribes' governmental status and tribes' rights and interests are more likely to be properly understood and considered when deliberations are structured appropriately.

Second, the delay that has been permitted on the states' and EPA's watch is unconscionable and unnecessary. Both the states and EPA have tools at their disposal to avoid such delay. It is, plain and simple, a matter of commitment. Were the states and EPA to scrutinize their respective authorities from a posture of a successor seeking to uphold their obligations under the treaties, they would find ample muscle to flex. EPA, as a federal trustee and congressionally appointed custodian of the CWA, has a particular obligation to be active rather than passive, to be creative rather than flat-footed.

Third, non-starters might usefully be identified and removed from the table. Arguments that may be plausible elsewhere but are untenable given the tribal context could be identified as such early on, and placed to the side. Arguments, for example, for applying a diet fraction to consumption rates derived from contemporary surveys or other devices that are inappropriate when tribes' treaty-secured rights to take fish are at stake, could be removed from serious contention. The states and EPA might work with their tribal partners to engage the treaties and courts' interpretations of the treaties, and determine their implications for the various technical arguments likely to be encountered in crafting water quality standards. This would require legal and technical expertise; it could then involve broader educative efforts, so that all participants in the process understood the implications of tribal rights for arguments that might otherwise be entertained. This effort might include placing a figurative asterisk by those agency determinations that derived from a pre-culverts era in which the contours of tribal rights may not have been adequately appreciated, for example, Washington MTCA's default

application of a diet fraction of 0.5, so that these determinations' precedential reach is properly limited. Such an approach would not only prevent inappropriate arguments from nonetheless carrying the day, but also make the process more efficient, by alleviating delay and avoiding the expenditure of unnecessary resources to counter on the merits what are, after all, non-starters.

Fourth, agencies might do more to ensure "clean science." This point is in many respects a matter of good governance, and so not unique to the tribal context. However, to the extent that corrosive broadsides are directed at tribally conducted science, EPA, as federal trustee, should be particularly vigilant. Moreover, to the extent that a failure to correct distortions and mischaracterizations permits analyses that undermine tribal rights, each of the agencies involved ought to be more active in setting the record straight. EPA in particular, can assume a leadership role envisioned for it by Congress in ensuring science-based decision making under the CWA. EPA might, for example, have been more active in issuing explicit statements regarding the scientific defensibility of the various consumption surveys, thereby allowing states and tribes to direct their energies to the remaining questions.[345] EPA and the states might also more actively correct inaccuracies and distortions submitted as part of public debate, rather than simply passively repeating all arguments that they "hear" in an effort to appear "responsive." And all agencies might do more to clarify and model appropriate usage of key terms (e.g., "conservative" versus "protective" responses to various features of the data; "marine" versus "open ocean" waters).[346] Again, such steps would

[345] Recall that EPA had already embraced the tribal studies involved, for example, in its Exposure Factors Handbook. *See* discussion *supra* note 239 and accompanying text. But more could be done to reiterate earlier findings of scientific defensibility. States' and tribes' inquiries would thus be appropriately limited to the narrower question of whether these (scientifically defensible) studies were appropriate for the populations affected by their standards.

[346] *See, e.g.,* Ted Sturdevant, Director, Washington State Department of Ecology, Open Letter to Interested Parties (Jan. 15, 2013) ("Much concern has been expressed that using higher fish consumption rates in combination with other conservative public policy choices about exposure and risk could create an impossible burden for regulated dischargers. While these public policy choices have not been made, this is a valid concern.").

also avoid unnecessary delay, occasioned by demands for additional, "sound" science premised on spurious characterizations of the existing science.

Fifth, agencies, particularly EPA, might enlarge their support for efforts to ask the right question, i.e., to take a step back and recognize the potential for water quality standards to impair the future exercise of tribal rights to take fish. Tribes have often been leaders here, and EPA has frequently been among those providing funding and technical review. Efforts might nonetheless be enlarged to reconsider the orientation of exposure assessment, so that standards are set based not on consumption practices in our current, contaminated world, but in a future, resilient world – one in which healthy aquatic ecosystems support robust fisheries fit for humans to eat.

In all of this, non-tribal governments should work with tribal governments to imagine how the CWA and other legal tools can be used as a means to effectuate the treaty promises rather than to undermine them.

CONCLUSION

As state and federal agencies have sought to pursue fishable waters in the Pacific Northwest, they have enlisted risk-based methods to set water quality standards. The genius, from the perspective of those seeking to avoid or forestall regulation, of filtering our restorative efforts through a risk-based approach is illustrated by experience here. The method's demand for quantified inputs affords ample opportunity to call for increasingly fine-grained data in the name of "sound science" – to the point where the ideal of tracing each forkful of contaminated fish from source to mouth is achieved. All of this data, of course, takes time to gather. And all of this data may permit agencies to measure ever more precisely humans' current practices and exposures – but distract them from the more germane question of envisioning future practices in a less contaminated and more resilient world. Risk-based methods also manage the neat trick of removing from view exactly *who* is affected by agencies' decisions. By speaking in abstractions – setting standards to protect the

90th percentile of a particular population to a level of 1 in 1,000,000 risk – agencies and other participants in the process can more easily ignore the import of the choices they make. The language of risk can obscure the fact that, in the Pacific Northwest, these choices impact tribal people and treaty-secured rights.

Agencies' risk-based methods, of course, are just means to an end; they need not eclipse the larger goal nor downplay the responsibilities that ought to frame our efforts. Instead, in the words of Doug Kysar, a "deciding agent would always remain cognizant of the unavoidable burden of discretion and responsibility that lends a tragic cast to capital punishment, environmental law, and other areas of regulated violence."[347]

In the tribal context that permeates environmental decisions in the Pacific Northwest, we all have a responsibility as successors to the treaties. Our choices – cast as they may be in the language of fish consumption rates and exposure duration – determine whether aquatic environments will support or undermine the obligations we undertook to secure tribes' "right to take fish." If we come up short, we indeed permit regulated violence.

The treaties and other agreements between the tribes and the United States are a source of responsibility – they bind us and they will bind our children in the years to come. We should do more to ask how the treaties can serve as a charter for the future – a future in which our waters support a fish resource that is again abundant and healthful, a future in which we keep the solemn promises that shaped this place.

[347] DOUGLAS A. KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 58 (2010).

EVIDENCE ISSUES IN INDIAN LAW CASES

Taylor S. Fielding*

INTRODUCTION

"American archaeology has reached the point where its very survival depends upon close interaction with the realm of law."[1] This statement appeared in a report of a seminar in law in archaeology in 1977. Granted, this seminar was held just a few years after the *United States v. Diaz*[2] case, where the Ninth Circuit reversed a conviction under the Antiquities Act of 1906,[3] and ruled the Act itself was unconstitutionally vague. Ironically, however, it would be thirteen more years before the anthropological world was shaken through the passage of the Native American Graves Protection and Repatriation Act (NAGPRA),[4] which would precipitate extensive litigation between tribes, museums, and federal government agencies.

Jack F. Trope and Walter R. Echo-Hawk write in their historical overview of NAGPRA that it was meant to emphasize *human rights* origins, and to address one of the flagrant violations of the civil rights of Native Americans – proper respect for the burial of their dead.[5] Trope and Echo-Hawk also write that the passage of NAGPRA was seen by many in Congress as a logical extension of the federal government's trust responsibility to Native American, Hawaiian, and Alaskan Native groups.[6]

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[1] Michael Moratto, *A Consideration of Law in Archeology*, MANAGEMENT OF ARCHEOLOGICAL RESOURCES: THE AIRLIE HOWE REPORT 9 (CHARLES R. MCGIMSEY III AND HESTER A. DAVIS EDS., 1977).

[2] United States v. Diaz 499 F.2d 113 (9th Cir. 1974).

[3] 16 U.S.C. § 431-433.

[4] Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. § 3001 to 3013).

[5] Jack F. Trope and Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act Background and Legislative History,* REPATRIATION READER: WHO OWNS AMERICAN INDIAN REMAINS? 123-168 (DEVON A. MIHESUAH ED. 2000).

[6] *Id.*

NAGPRA outlines a series of actions that are required if archaeological investigations inadvertently uncover Native American remains.[7] These include: cessation of activities, notification of supervisory personnel or the state historic preservation officer, and consultation with "affiliated or potentially affiliated" Native American groups.[8] NAGPRA also directs museums and other federally-funded institutions[9] to inventory and attempt to determine the cultural affiliation of Native American remains, funerary objects, and objects of cultural patrimony in their collections.[10] If cultural affiliation could be established, notification is then required of the appropriate federally recognized tribal group that may request repatriation.[11]

In the thirty years since the report on the interaction of law and archaeology seminar, practitioners of all of the anthropology sub-disciplines have served as expert witnesses in numerous cases, both civil and criminal. Often, anthropologists are called as experts to provide the court with information on the culture and history of Native American groups, rather than Native American groups informing the court themselves. This paper will examine whether anthropologists are really more qualified to give testimony about Native American groups, while tribal member testimony, especially about the tribe's oral history, is marginalized. Part I of this paper will examine some of the problems identified with applying the *Daubert* factors to "soft science," and will examine the disparity in cases where anthropologists have testified. Part I will also discuss whether anthropologists, specifically archaeologists, can even provide complete expert testimony without talking to tribal members. Part II of this paper will examine how the testimony of tribal members regarding oral history could be admitted into court. Part III of this paper will then turn to the issues of bias against oral history testimony.

[7] 25 U.S.C. § 3002.
[8] *Id.*, *see generally* THOMAS F. KING, THINKING ABOUT CULTURAL RESOURCE MANAGEMENT (2002); BRIAN M. FAGAN, IN THE BEGINNING (HarperCollins, 8th Ed. 1994).
[9] The Smithsonian Institution and its approximately 18,500 skeletons are exempt, as its collections are specifically covered by the National Museum of the American Indian Act of 1989, Pub. L. No. 101-185, 103 Stat. 1336 (codified at 20 U.S.C. § 80q to 80q-15); *see also* Fagan, *supra* note 8, at 471; *see generally,* JACK UTTER, AMERICAN INDIANS: ANSWERS TO TODAY'S QUESTIONS (2d ed. 2002).
[10] 25 U.S.C. § 3003.
[11] *Id.* at § 3005.

I. EXACTLY WHO ARE ANTHROPOLOGISTS AND WHAT DO THEY STUDY?

Anthropologists, like ice cream, come in various flavors. Anthropology is so diverse that practitioners often specialize in one area.[12] Thus, not every anthropologist will have knowledge of Native American cultures, traditions or life ways, just as not every medical doctor would know how to treat a heart condition. Since the major topics of study are cultural and biological, the field is sometimes dichotomized in this manner.[13] The broad field of anthropology is traditionally broken down into four subfields: cultural anthropologists, anthropological linguists, physical or biological anthropologists, and archaeologists.[14]

Cultural anthropologists study people and their cultures.[15] Cultural anthropology is also sometimes called social anthropology,[16] although some see the term social anthropology as describing those who specifically study social relations.[17] Cultural anthropologists as a group contain additional variation: ethnographers, who study the specific cultural practices of a certain group of people; and ethnologists,[18] who use the data recorded by the former to make general comparisons between cultures.[19] Linguists are a division of anthropologists who study language,[20] work closely with cultural anthropologists and are considered by some to be a subdiscipline of cultural anthropology.[21]

Physical or biological anthropologists study the bones and other physical features of the human body.[22] Archaeologists excavate and examine "the material remains of extinct cultures."[23] Archaeologists' work is often focused on the structures and items left behind in a certain

[12] E. ADAMSON HOEBEL, ANTHROPOLOGY: THE STUDY OF MAN 9 (4th ed. 1972).
[13] *Id.*
[14] MARVIN HARRIS, CULTURE, MAN, AND NATURE, AN INTRODUCTION TO ANTHROPOLOGY 1 (1971).
[15] Harris, *supra* note 14.
[16] *Id.*
[17] Hoebel, *supra* note 12, at 12.
[18] ROBERT B. TAYLOR, INTRODUCTION TO CULTURAL ANTHROPOLOGY 16 (1973).
[19] *Id.*
[20] JOSEPH H. GREENBERG, ANTHROPOLOGICAL LINGUISTICS: AN INTRODUCTION 20 (1968).
[21] Hoebel, *supra* note 12, at 12.
[22] THOMAS W. MCKERN AND SHARON MCKERN, HUMAN ORIGINS, AN INTRODUCTION TO PHYSICAL ANTHROPOLOGY 5 (1969).
[23] DAVID HURST THOMAS, PREDICTING THE PAST, AN INTRODUCTION TO ANTHROPOLOGICAL ARCHAEOLOGY 1 (1974).

geographic area.[24] Archaeologists may work closely with physical anthropologists if human remains are present.[25] Unfortunately for modern archaeologists, this subfield still carries some taint from its past, as the first "archaeologists" were in fact "the looters and grave robbers in antiquity."[26]

A. Soft Science, Meet the *Daubert* Factors

Anthropologists and archaeologists are considered social scientists, and despite the difference between these and other *soft science* fields when compared to *hard science* fields of the natural and physical sciences, the same evidentiary rules apply in court.

As part of the United States Supreme Court ruling that Federal Rule of Evidence 702 replaced the *Frye* standard for the Federal Rules of Evidence in *Daubert v. Merrell Dow Pharmaceuticals,*[27] the Supreme Court outlined five criteria courts could employ in their preliminary assessment of the reliability of scientific testimony. These factors are:

1. whether the theory offered had been tested;
2. whether it had been subjected to peer review and publication;
3. the known rate of error;
4. the existence of standards and controls; and
5. whether the theory is generally accepted in the scientific community.[28]

The application of these factors – especially the known rate of error criteria – work well when dealing with *hard sciences* such as chemistry and physics. However, the difficulty comes in applying the *Daubert* factors to non-scientific expert opinion testimony, where instead of a particular scientific methodology, an expert's opinion is based upon experience or training.[29] After *Daubert*, courts had mixed opinions as to whether the

[24] *Id.* at 3-4.
[25] Patricia M. Landau and D. Gentry Steele, *Why Anthropologists Study Human Remains*, 20 AM. INDIAN Q. 209, 212, 214 (1996).
[26] Thomas, *supra* note 23, at 1.
[27] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).
[28] *Id.* at 593
[29] *See* Compton v. Subaru of Am., Inc., 82 F.3d 1513, 1518 (10th Cir.), *cert. denied*, 117 S.Ct. 611 (1996)(collecting 10th Circuit cases where *Daubert* did not apply to non-scientific expert testimony.)

Daubert factors were applicable to non-scientific expert opinions.[30] The Supreme Court answered the question definitively in 1999:

> *Daubert's* general holding – setting forth the trial judge's general "gatekeeping" obligation – applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. . . . [A] trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case.[31]

Thus, as a result of the Supreme Court's decision, the *Daubert* factors apply to testimony presented by *soft scientists*, such as anthropologists. Some practitioners in the field of archaeology itself even question "whether the field of archaeology can ever be pursued as a science."[32] While some archaeological methodologies are based on scientific principles, these methodologies may not be as objective and scientific in practice as they are in theory.[33] For example, in physical anthropology, the use of precise measurements in craniometric analysis[34] seems objective and scientific.[35] In reality, however, these variables "tend to exhibit a high degree of intra- and inter-observer error."[36] In addition,

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[30] *Compare* Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1997) (applying Daubert factors to non-scientific expert testimony on police discipline), *and* Moore v. Ashland Chemical, Inc., 126 F.3d 679 (5th Cir. 1997)(holding Daubert factors not applicable to testimony by clinical physician, differentiating clinical medicine from laboratory or research medicine).
[31] Kumho Tire Co., Ltd v. Carmichael, 526 U.S. 137, 142 (1999).
[32] Allison M. Dussias, *Kennewick Man, Kinship and the "Dying Race": The Ninth Circuit's Assimilationist Assault on the Native American Graves Protection and Repatriation Act*, 84 NEB. L. REV. 55, 116 (2005) (quoting J.M. ADOVASIO AND JAKE PAGE, THE FIRST AMERICANS: IN PURSUIT OF ARCHAEOLOGY'S GREAT MYSTERY 15 (2002)).
[33] *See also* Ashley Young, *Continuing an American Legacy of Racial and Cultural Injustice: A Critical Look at Bonnichsen v. United States*, 17 DEPAUL LCA J. ART & ENT. L. 1, 34 (2006) (discussing the fact the methods and theories of crainology were once believed to be objective and neutral).
[34] Craniometrics is the science of studying the size and shape of the skull. *See* Eleanor M. Miller and Carrie Yang Costello, *The Limits of Biological Determinism*, 66 AM. SOC. REV. 592, 592 (2001).
[35] Dussias, *supra* note 32, at 116.
[36] *Id.* (quoting the Osteological Assessment Report on the Kennewick Man remains completed by Joseph F. Powell and Jerome C. Rose). *See also* Nicholas Wade, *A New Look at Old Data May Discredit a Theory on Race*, N.Y. TIMES, (Oct. 8,

these measurements can be perverted into supporting incorrect conclusions, as they do in craniology.[37] Moreover, the use of the geological method of stratigraphy suffers from the same variability. For instance, the number of stratigraphic layers that can be identified in the side-wall of an excavation unit[38] can depend on who is viewing the side-wall as well as lighting and soil conditions. The technique of radiocarbon (C^{14}) dating, developed in the late 1940s, fulfills the *Daubert* factors of a well-tested theory that has been peer reviewed and accepted by the scientific community.[39] However, even this relatively *scientific* method does not always hold up to the *Daubert* factor of replication to receive the same result, as other hard science tests would. As an example, evidence of this is present in the *Bonnichsen* case, where the results of radiocarbon dating on bone samples varied greatly between the 1996 and 1999 tests.[40]

Thus, the objectiveness and scientific characteristics of anthropology clearly fall to the *softer* side of the spectrum, even for more scientific methodologies such as radiocarbon dating. Anthropology is not alone in this plight, as historians and linguists are similarly situated. How effectively the *Daubert* factors apply to soft science fields, such as history and linguistics, and how successfully the methodologies used in those soft science fields would hold up against the *Daubert* inquiry is open to debate.

2002)http://www.nytimes.com/2002/10/08/science/a-new-look-at-old-data-may-discredit-a-theory-on-race.html (last visited Apr. 19, 2013).

[37] During the Nineteenth Century, a pseudoscience called craniology, although sometimes incorrectly referred to also as craniometry, developed based on numerous studies completed using craniometric methods that showed different skull capacities between ethnic groups and genders, leading to conclusions that skull capacity was a way to measure intelligence. *See* Miller and Costello *supra* note 34; Catherine E. Martin, *Educating to Combat Racism: The Civic Role of Anthropology*, 27 ANTHROPOLOGY & EDUC. Q. 252, 255 (1996).

[38] The identification of stratigraphic layers in an archaeological excavation is based on the geological law of superposition, which in archaeology, is interpreted as a distinct layer of soil or refuse occurring above another layer is presumed to have been deposited later in time than the underlying layer. This technique allows for an archaeologist to create a rough chronology of occupation for the site based on the layers. This technique can be inaccurate if the layers are mixed by natural or human processes. *See generally* John Howland Rowe, *Stratigraphy and Seriation*, 26 AM. ANTIQUITY 324 (1961); Edward C. Harris, *The Laws of Archaeological Stratigraphy*, 11 WORLD ARCHAEOLOGY 111 (1979).

[39] *See* R.E. Taylor, *The Contribution of Radiocarbon Dating to New World Archaeology*, 42 RADIOCARBON 1, 3-4 (2000).

[40] Bonnichsen v. United States, 217 F. Supp. 2d at 1128, (noting the great variability in the results may have been due to any number of factors) *see also,* Thomas *supra*, note 23 (radiocarbon dates ranged from 8410 +/- 40 years before present to 5570 +/- 100 years before present; with several sample results falling in between).

Courts experience difficulty in applying the *Daubert* standards to historical scholarship, according to one author.[41] In her analysis, Schneider found that the testability factor is difficult to apply without an objective historian.[42] Specifically, the publication and peer review factor is not necessarily helpful in weeding out "junk history."[43] Additionally, the potential rate of error, the third *Daubert* factor, is "completely inapplicable as a standard for evaluating historical scholarship."[44] The existence of standards is also difficult to apply due to a lack of a "widely recognized code of conduct."[45] Lastly, general acceptance could be deceiving, since general acceptance may be roughly gauged by scholarly works, yet they are a poor test for methodological reliability.[46]

Alternatively, linguistics "should fare quite well" in response to a *Daubert* inquiry, at least according to two legal scholars.[47] Scholars cite the fact that "[l]inguistics is a robust field that relies heavily on peer-reviewed journals for dissemination of work."[48] While acknowledging that multiple theories may exist in the field of linguistics, Tiersma and Solan assert the facts would be immutable:

> "while there may be disagreement as to *why* we understand a given linguistic structure to have a particular range of meanings, the *fact* of the range of meanings should not normally be controversial."[49]

Alternatively, the presence and even the use of multiple theories in data analysis have been advocated in some fields as an inquiry into "how findings are affected by different assumptions and fundamental premises."[50] The issue of multiple theories in a field of study is also present in anthropology, and cannot be easily dismissed. Anthropologist Kerry D. Feldman asks the question, "to what extent are we, or can we be,

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[41] Wendie Ellen Schneider, *Past Imperfect*, 110 YALE L. J. 1531 (2001).
[42] *Id.* at 1538.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Peter Tiersma and Lawrence M. Solan, *The Linguist on the Witness Stand: Forensic Linguistics in American Courts*, 78 Language 221, 225 (2002).
[48] *Id.*
[49] *Id.* at 226 (emphasis in original).
[50] Michael Q. Patton, *Enhancing the Quality and Credibility of Qualitative Analysis,* 34 HEALTH SERVICES RESEARCH, 1189, 1196 (1999).

competent expositors of all of them?"[51] Feldman, who was an expert witness in litigation involving an Alaskan Native Village corporation, noted "both sides found scientific data to support their claims" which he feels "forces the anthropologist to examine even more closely the nature of 'facts' in relation to personally held 'theories' which purport to explain those facts."[52]

Feldman further describes "a fundamental incongruence" between the research methods of social science and legal evidence rules.[53] Specifically, the ethnographies produced by anthropologists are entirely based on oral narratives that would be deemed hearsay in court.[54] However, another scholar, Lawrence Rosen, advocates that anthropologists acting as expert witnesses may actually be able to glean something from their experience.[55] Rosen writes that participation in the Indian Claims Commission (ICC) hearings may have resulted in scholars' altering their classification systems in their studies to more closely parallel the categories being used by the ICC.[56]

Additionally, Rosen cites an overhaul of anthropological methodologies.[57] The conclusion to Rosen is obvious, "it is clear that participation in legal cases has had a reciprocal effect on anthropological thinking."[58] Even if Rosen is correct, and some members of that generation of anthropologists did alter their practices based on the ICC experiences, it is doubtful that this change would make anthropology more robust if tested against the *Daubert* factors.

Even if anthropologists altered their methodologies based on legal experiences, it does not change the fact that the *Daubert* factors were originally developed for a hard science field, that of medicine and pharmaceuticals. Thus, many of the *Daubert* factors are easily applied to laboratory research where most if not all variables can be controlled, and

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[51] Kerry D. Feldman, *Ethnohistory and the Anthropologist as Expert Witness in Legal Disputes: A Southwestern Alaska Case*, 36 J. OF ANTHROPOLOGICAL RES. 245, 246 (1980).
[52] *Id.* at 248.
[53] *Id.* at 246.
[54] *Id.*
[55] Lawrence Rosen, *The Anthropologist as Expert Witness*, 79 AM. ANTHROPOLOGIST 555 (1977).
[56] *Id.* at 567.
[57] *Id.*
[58] *Id.*

an experiment repeated to achieve the same result. While each of the subfields of anthropology has established methods and procedures designed to eliminate error, it remains that anthropological research has a subjective quality that cannot be eliminated. In addition, it is clear that some anthropological methodologies, such as the gathering of oral narratives and histories to compose ethnographies, did not change. As Feldman points out, this methodology is part of the problem, since the source material is deemed unreliable by courts.[59]

B. Anthropologists Take the Stand as Expert Witnesses

This paper will focus on cases where anthropologists have testified as expert witnesses. In order to sufficiently narrow the topic of discussion, the cases examined involved Native American groups and can be easily divided into two categories: treaty right cases and cultural resources cases.

1. Treaty Rights Cases

The cases classified here as treaty rights cases arose in United States district courts and were both state challenges to the validity and possible state regulation of Native Americans' off-reservation fishing rights.

The first case, *United States v. Washington,*[60] adjudicated the validity of off-reservation treaty rights in rivers and off-shore waters of Western Washington Native American groups. Due to the trust relationship between Native Americans and the federal government, the suit was brought by the United States against the State of Washington. The *Washington* case also addressed the issue of state regulation of Native Americans' off-reservation fishing activities, with the court holding that the power of general regulation was with the tribes and not within the state's police powers. However, the court did allow for the State to impose some regulations on off-reservation Native American fishing, but only where the State did not discriminate against Native American fishermen, and where the State could show the restrictions were "reasonable and necessary to conservation."[61]

[59] Feldman, *supra* note 51, at 246.
[60] United States v. Washington, 384 F. Supp. 312 (W.D. Wash., 1974).
[61] *Id.* at 342.

The beginning of the section of the *Washington* opinion discussed the pre-treaty role of fishing in the lives of northwest Native Americans, and focused on a classic situation seen in civil cases: dueling experts. The anthropologists presented reports on "Indian life in the case area at and prior to the time of the treaties, including the treaty councils, Indian groups covered by the treaties, the purposes of the treaties and the Indians' understanding of treaty provisions."[62] The court found the testimony and reports of the plaintiffs' anthropologist more credible. Specifically, the court said, "nothing in [the anthropologist appearing for the plaintiffs'] report and testimony was controverted by any credible evidence in the case."[63] The use of oral histories is not even mentioned in the opinion until the next to last finding of fact in that section, three pages later in the reporter. The use of oral histories appears to have been limited to the identification of traditional fishing areas used by the Native American plaintiffs in the case.

The second case, *United States v. Michigan,*[64] also involved a challenge by tribes to the regulation of their off-reservation fishing activities by the state. The opinion specifically names three plaintiff witnesses: an ethnohistorian,[65] and two anthropologists. The *Michigan* court dedicated a paragraph to each of these witnesses, describing their qualification as an expert, and in one case, criticizing the defense's attempt to impeach the plaintiffs' anthropologist. While testimony regarding oral histories of the tribes involved was heard, the court fails to mention any of these witnesses by name. In fact, the court gives only two lines in the opinion to recognize the Native American witnesses who appeared for the plaintiff United States and tribes: "The oral testimony of the tribal witnesses educated in the history and customs of their people by tribal elders is found to be reasonable and credible factual data regarding certain relevant aspects of Indian life at and after treaty times."[66]

[62] *Id*. at 350.
[63] *Id*. at 350.
[64] United States v. Michigan, 471 F. Supp. 192 (N.D. Mich., 1979).
[65] An ethnohistorian is a practitioner of the ethnohistorical method, where the history of a specific group or culture is developed through the use of "ethnography, linguistics, archaeology and ecology." *See* American Society for Ethnohistory, About the ASE, http://www.ethnohistory.org/sections/about_ase/index.html (last visited Apr. 19, 2013).
[66] United States v. Michigan, 471 F. Supp. at 219.

2. Cultural Resource Cases

Ironically, both of the cultural resource cases examined arose in the Ninth Circuit, the same circuit that found the Antiquities Act[67] unconstitutionally vague in *United States v. Diaz,*[68] Both *Bonnichsen v. United States* and *Fallon-Paiute Shoshone Tribe v. United States* also involved the extremely old (8,300 to nearly 10,000 years old) remains of an individual male.

In *Bonnichsen v. United States,*[69] the Ninth Circuit was hearing a challenge by tribes to a district court ruling that the remains of an individual, who died possibly as long as 9,200 years ago, were subject to the Archaeological Resource Protection Act (ARPA),[70] not (NAGPRA). The lower court rejected the government's determination that the individual was a Native American, and thus held that NAGPRA was inapplicable.[71]

In the lower court, the magistrate judge held that "reliance upon oral narratives under the circumstances presented here is highly problematic." Even though the narratives were presented by an anthropologist, the lower court still found this evidence to be unreliable. The district court's ruling demonstrates that even when oral narrative evidence is presented by an anthropologist, who would have been qualified as an expert under the *Daubert* standard, acceptance of the evidence by the court is not a foregone conclusion. It must be concluded that the court, despite the involvement of an anthropologist, finds the underlying material from which the anthropologist draws his conclusions, the oral narratives themselves, to be defectively unreliable. The court instead used archaeological and radiocarbon dating evidence to find there were sufficient gaps in the chronological record, which the court concluded showed a lack of cultural affiliation between the remains and the tribal claimants.

The second case, *Fallon Paiute-Shoshone Tribe v. United States,*[72] is factually similar to the *Bonnichsen* case, also involving the remains of an individual of similar age and described as "an extremely ancient

[67] 16 U.S.C. § 431-433.
[68] United States v. Diaz, 499 F.2d 113 (9th Cir. 1974).
[69] Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004).
[70] Pub. L. No. 96-95, 93 Stat. 721 (1979) (codified at 16 U.S.C. § 470aa to 470mm).
[71] Bonnichsen v. United States, 217 F. Supp. 2d 1116 (D. Or., 2002).
[72] Fallon Paiute-Shoshone Tribe v. United States, 455 F. Supp. 2d 1207 (D. Nev., 2006).

habitant of Northern Nevada."[73] However, the United States District Court noted neither the tribe, nor the Bureau of Land Management (BLM), had raised the issue of whether the individual was a Native American. Therefore, the *Bonnichsen* cases, and the determination that ARPA rather than NAGPRA was applicable to a skeleton of this antiquity, were not controlling.[74] The Tribe argued that the BLM did not take into account scientific evidence it presented,[75] while the BLM argued it could rely on its own experts.[76] The Tribe retained its own experts and provided the BLM with the evidence it had gathered, at which point the Tribe claims it was shut out of the process for determining the affiliation of the remains.[77] The Tribe provided additional evidence when the issue was presented to the NAGPRA Review Committee, which issued a non-binding advisory opinion stating that the tribe was affiliated with the remains.[78] The court acknowledged the BLM's right to believe its expert, but noted that position "does not leave the BLM free to ignore other competing views by failing to recognize their existence and refusing to describe the reasons why they were not accepted."[79] This case was remanded to the BLM by the court after it found the determination the remains were culturally unaffiliated to be arbitrary and capricious. In remanding the case, the court instructed, "BLM is reminded that it must present cogent reasons for its findings, even when it is essentially choosing between two competing theories."[80]

C. Consideration of Oral History as an Interpretive Guidepost

Whether archaeologists should look to Native American oral traditions themselves is debated. Some archaeologists advocate using oral histories as a resource for interpreting archaeological findings, possibly giving the archaeological findings context.[81] Others dismiss oral histories as not testable as an archaeological hypothesis,[82] but "[n]evertheless, foolish or angelic archaeologists will continue to pick and

[73] *Id.* at 1209.
[74] *Id.* at 1216.
[75] *Id.* at 1219-1220, 1223.
[76] *Id.* at 1224.
[77] *Id.* at 1219.
[78] *Id.* at 1223.
[79] *Id.* at 1224.
[80] *Id.* at 1225.
[81] Peter M. Whiteley, *Archaeology and Oral Tradition: The Scientific Importance of Dialogue*, 67 AM. ANTIQUITY 405 (2002).
[82] *Id. See also* Ronald Mason, *Archaeology and Native North American Oral Traditions*, 65 AM. ANTIQUITY 239 (2000).

choose among the offerings of oral traditions."[83] Those archaeologists who question the value of oral histories and traditions and advocate not relying on them, are often the greatest proponents of archaeology as a scientific endeavor. These proponents argue that "[t]o preserve, let alone extend, the unparalleled power of science and systematic historiography to produce testable historical statements requires, like liberty, eternal vigilance."[84] The view of this position is that archaeologists are objective, truth-seeking scientists.[85]

This position is contrasted by those who believe Native American oral histories and traditions not only have value, but can in fact be tested.[86] For example, the examination of the remains of massacre victims by a physical anthropologist contradicted the Church of Jesus Christ of Latter-day Saint's historic accounts of the event, and were more consistent with the accounts obtained through interviews of various parties, including Native Americans, done by United States Army officers within a couple of years of the event.[87] In addition, Whiteley points to the presence of specific place names and locations in Hopi migration legends which could theoretically be tested archaeologically.[88] Archaeologists holding this latter view often point to the *classical archaeology* where archaeological discoveries are compared to ancient Greek and Roman records,[89] noting that field of study is "hardly lacking analytical vigor."[90] The difference between the acceptance of Greek and Roman written records in classical archaeology versus the rejection of oral histories and traditions in prehistoric archaeology comes down to the method of recordation.[91] Yet, many anthropologists who are willing to accept oral history and tradition as valid evidence believe it may be more accurate than written accounts of the same event.[92] Of course, there exists the real possibility that no matter which source is being tested, Native American

[83] Mason, *supra* note 82, at 262.
[84] *Id.* at 263.
[85] *Id.* at 264.
[86] Whiteley, *supra* note 81, at 413.
[87] See Kevin Vaughan, *Utah's Killing Field,* ROCKY MOUNTAIN NEWS, available at http://denver.rockymountainnews.com/killingfields/index.shtml (last visited Apr. 19, 2013).
[88] Whiteley, *supra* note 81, at 408-410.
[89] *Id.* at 408.
[90] *Id.* at 413.
[91] *Id.* at 408.
[92] Feldman, *supra* note 51, at 246; *see also* Whiteley, *supra* note 81, at 408 (criticizing Southwestern archaeologists for accepting Spanish colonial written records as accurate without question).

oral history or written records of the dominant culture, the resulting data uncovered by scientists and their conclusions may disprove the very fact being investigated.[93]

It appears the one point archaeologists can agree on is that there is a schism in the field, based on an idea there are, at least, two ways to view and interpret the past,[94] either through the examination of archaeological artifacts or through the learning of Native American oral narratives and histories, with the heart of the disagreement being the amount of weight and credibility to be given to which and whose interpretation.[95]

II. NATIVE AMERICANS SPEAK FOR THEMSELVES

The use of Native American tribal members in presenting testimonial evidence of their oral traditions may be accomplished in one of two ways: qualifying the tribal member as an expert witness or via a hearsay exception.

A. An Elder as an Expert

A Native American can serve as an expert witness as to the tribe's traditions, understanding and history, as shown in *Cree v. Sandberg*.[96] This case was an appeal by the State of Washington of a district court ruling that the Yakama Tribe's treaty exempted the tribe from paying Washington's truck license and permit fees. The Ninth Circuit upheld the exemption, noting the district court's reliance on a tribal member's

[93] *See* D. Gareth Jones and Robin J. Harris, *Archaeological Human Remains: Scientific, Cultural and Ethical Considerations*, 39 CURRENT ANTHROPOLOGY 253, 260 (1998); James W. Springer, *Scholarship v. Repatriation,* Academic Questions 6, 19-20 (2005).

[94] The schism between these ways of knowing the past has been characterized as analogous to the evolution versus creationism conflict involving the origin of the human species. *See* Tamara L. Bray, *Repatriation, power relations and the politics of the past*, 72 ANTIQUITY 440, 442 (1996); Taylor S. Fielding, *Digging Up Controversy*, STANDARD-EXAMINER, Nov. 11, 2001, at D1. Other authors cite the difference as being due to "fundamentally different worldviews," in which "the two groups do not share concepts concerning time, death and self-identity… ." D. Gareth Jones and Robin J. Harris, *Archaeological Human Remains: Scientific, Cultural and Ethical Considerations*, 39 CURRENT ANTHROPOLOGY 253, 256 (1998). *See also* Whiteley, *supra* note 81, at 405; Mason *supra* note 82, at 248.

[95] Whiteley, *supra* note 81 at 408; Mason *supra* note 82, at 263.

[96] Cree v. Sandberg, 157 F.3d 762 (9th Cir. 1998).

testimony as to the tribe's understanding of the treaty language was not an abuse of discretion.[97]

Qualifying a tribal member to be an expert witness is not outside the realm of the Federal Rules of Evidence. Rule 702 allows for a witness to be qualified as an expert not only through scientific credentials, but also if the witness has specialized knowledge or experience.[98] In examining Rule 702, authors have commented, "[t]here are no definite guidelines for determining the knowledge, skill or experience required either in a particular case or of a particular witness."[99] In Native American culture, it is often that only certain members of the tribe may know the "particulars of the territory, its mythological construction, and cultural uses."[100] In hearing evidence on matters related to Native Americans, courts should consider that certain tribal members, including elders, testifying as to their own oral traditions and history would be *experts* as they would have access to knowledge that may not generally be known. Being able to include this knowledge in the evidentiary records clearly would be helpful to the trier of fact, which is the *touchstone* for the admissibility of expert testimony.[101]

Not all are so willing to find the testimony of tribal members, especially elders, as helpful in the search for truth. Mason, an anthropology professor, claims such testimony is biased because it "credits 'elders' with powers of memory credibility far beyond anything that would be granted anyone else."[102] Mason further attacks those identified as tribal elders as having "a credential with known power to disarm otherwise worldly scholars. . . a potential trap as likely constructed by the information seeker as by its giver."[103]

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[97] *Id.* at 773-4.
[98] Fed. R. Evid. 702, *see also* Bratt v. Western Airlines, 155 F.2d 850 (10th Cir. 1946).
[99] STEVEN GOODE AND OLIN GUY WELLBORN III, COURTROOM EVIDENCE HANDBOOK, 2006-2007 STUDENT EDITION 206 (2006) (Author's commentary on Fed. R. Evid. 702 and citing *Lauria v. Nat'l Railroad Passenger Corp.*, 145 F.3d 593 (3d Cir. 1998)).
[100] Bruce G. Miller, *Culture as Cultural Defense: An American Indian Sacred Site in Court,* 22 AM. INDIAN Q. 83, 90 (1998).
[101] Werth v. Makita Elec. Works, 950 F.2d 643 (10th Cir. 1991); *see also* Payne v. Soft Sheen, 486 A.2d 712 (D.C. 1985) (holding as a rule, expert testimony is admissible if it has the ability to aid the trier of fact in the search for truth).
[102] Mason, *supra* note 82, at 256.
[103] Mason, *supra* note 82, at 261.

Expert testimony given by tribal members or elders faces the difficulty of meeting the *Daubert* factors described above.[104] Clearly, the testimony being given by tribal elders is non-scientific in nature, versus testimony given by *soft science* anthropologists. How this would alter the application of *Daubert* is unclear. While the Supreme Court in *Kumho* tells the courts to apply the *Daubert* factors, the *Kumho* case, and some commentators, leaves open the possibility that "a court may have to consider factors other than those listed in *Daubert*."[105] Since the list of *Daubert* factors is "neither dispositive nor exhaustive,"[106] some of the alternative factors that may be considered include "unjustified extrapolation … to an unfounded conclusion,"[107] accounting for alternative explanations, and "whether the field of expertise … is known to reach reliable results."[108]

The basis for an expert's opinion testimony is governed by Federal Rule of Evidence 703. This rule sets forth three bases for expert testimony: personal knowledge, facts already in the record, and facts not in the record.[109] The facts in the third category must be "of a type reasonably relied upon by experts in the particular field in forming opinions and inferences upon the subject."[110] The third category is noted to be controversial since the expert can base an opinion on facts not in the record, and could base that opinion on "facts [that] may be inadmissible hearsay."[111] Courts have defended the policy allowing this external basis for an expert opinion since the court believes "the expert is fully capable of judging for himself what is, or is not, a reliable basis for his opinion."[112]

A tribal member's expert opinion testimony about the tribe's oral traditions and history would fall under this third basis. While the testimony about oral histories cannot be expected to "conform exactly to scientific models of falsifiability,"[113] in other words, they cannot be subjected to a mechanical formula to prove their truth, there are cultural "canons for

[104] Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. at 142.
[105] Goode and Wellborn, *supra* note 99, at 210 (citing Kumho Tire Co., Ltd. v.., 526 U.S. at 150).
[106] PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE 317 (2006).
[107] *Id.*
[108] *Id.* at 318.
[109] *Id.* at 351.
[110] *Id.*
[111] *Id.*
[112] *Id.* at 355 (quoting United States v. Sims, 514 F. 2d 147 (9th Cir. 1975)).
[113] Whiteley, *supra* note 81, at 411.

evaluating truth-claims and appraising the plausibility of particular accounts of the past."[114] Whiteley gives the example of two stories, each about the migration of a particular Hopi clan to their present day location. These stories "are entrenched features of a corpus of Hopi narratives," thus an individual who tells the stories incorrectly "would be dismissed as a know-nothing…."[115] This process, which Whiteley describes as subjecting the account to "critical standards of historical judgment,"[116] is the same process described by the *United States v. Sims*[117] court as the expert's own evaluation of a reliable basis.

B. Making Use of Hearsay Exceptions

The other option for admitting testimony about Native American oral traditions in court is to use an existing hearsay exception that allows the admission of hearsay testimony to prove "reputation concerning boundaries or general history."[118] The text of the hearsay exception allows testimony going to the "[r]eputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community . . ."[119]

In order to better understand the exception, the notes of the advisory committee prove somewhat helpful. These notes show that this hearsay exception "is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries."[120] There is sparse modern case law on this hearsay exception.

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[114] *Id.* at 407.
[115] *Id.*
[116] *Id.*
[117] United States v. Sims, 514 F.2d 147 (9th Cir. 1975) (A forgery case where the court allowed expert opinion testimony based on hearsay evidence). *See also* Gianelli, *supra* note 106, at 355 n.16 (referencing Soden v. Freightliner Corp., 714 F.2d 498 (5th Cir. 1983) that the court's focus should be on the reliability of the opinion and its foundation rather than the fact, that it technically hearsay, upon which it is based).
[118] Fed. R. Evid. 803(20).
[119] *Id.*
[120] Fed. R. Evid. 803, Notes of Advisory Committee, citing McCormick § 299.

In *Rickert v. Thompson*,[121] the court held hearsay evidence was admissible to prove ancient boundaries. However, the advisory committee notes appear to restrict the applicability of the exception: "the reputation is required to antedate the controversy, *though not to be ancient."*[122] Thus, testimony by a tribal member may not be admissible for the controversies found in the *Bonnichsen* and *Fallon Paiute-Shoshone* cases, which involve human remains that are several millennia old. However, the term "ancient" is not defined in either the Federal Rules of Evidence or in the advisory committee notes. Therefore, testimony from tribal members about the tribe's more recent oral history and traditions is still beneficial in establishing a presence in the area where remains are found so the tribe will be consulted upon the discovery of the remains[123] and possibly to establish cultural affiliation with the remains.[124] This is also important since past relocation or removal of tribes by the federal government may have resulted in a tribe being far removed from their aboriginal territory.[125] In addition, prior to European contact, many tribes were highly mobile hunter-gathers, who moved across large territories to exploit available resources.[126] This exception would have more applicability in cases where the subject of the controversy is not several millennia old, such as the treaty rights cases discussed above.

Another example where testimony regarding oral history was important evidence is the Indian Claims Commission[127] cases, although even in those cases, such testimony was sometimes given little or no

[121] Rickert v. Thompson, 8 Alaska 398 (1933) (A boundary dispute over mining claims where the court allowed testimony as to the boundaries where the boundary stakes were missing or had been removed).
[122] Fed. R. Evid. 803(20) (emphasis added).
[123] Such consultation is required by NAGPRA, 25 U.S.C. § 3002(d)(1); *see also* Fallon Paiute Shoshone Tribe, 455 F. Supp. 2d at 1217.
[124] Governed by NAGPRA, 25 U.S.C. § 3002(a)(2).
[125] Kurt E. Dongoske, *The Native American Graves Protection and Repatriation Act: a new beginning, not the end, for osteological analysis – a Hopi perspective*, 20 AM. INDIAN Q. 287, 289-290 (1996).
[126] This can be complicated, such as in Colorado, where the discovery of Native American remains on public land requires the notification of at least 14 different tribes who hunted or gathered on lands within Colorado at one time or another. *See generally* ANDREW GULLIFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS (2000).
[127] A commission created by Congress in 1946 (60 Stat. 1049) that waived the federal government's sovereign immunity and handled pre-1964 claims by Indian tribes for uncompensated ceded lands, unfulfilled treaty rights and obligations and other claims. The commission terminated in 1978.

credit.[128] In *Wally v. United States*,[129] the court allowed testimony as to reputation about facts which were no longer available to individuals or other proof to show the location of ancient boundaries. An argument can therefore be made that the oral histories of tribes would qualify as testimony to prove the reputation of facts about past events that are known by the community as a whole, but are no longer available to individuals. Testimony about oral histories could provide information not only about the boundaries of aboriginal lands, but also regarding tribal activities such as hunting, fishing and gathering methods,[130] and locations where those activities took place.[131]

Ironically, the exceptions to the hearsay rule reflect the preference, or perhaps bias, for written records, generally based upon the assumption that written records are a more correct and accurate reflection of an event than an oral statement, or as here, oral history. For example, exceptions to the hearsay rule exist for the records of religious organizations,[132] marriage and baptism certificates,[133] and personal family histories contained in family Bibles.[134] However, this is not surprising, since "[t]he law implicitly embodies the religious premises of the dominant culture."[135] Therefore, since the nature of many Native American traditions, practices, and religious activities are foreign to the courts, it is not surprising that evidence rules which seem to favor records of Christian and other Western religions have a preferred position. This reality is described well by Whiteley: "the Bible's very textuality enables it to be conceptualized as including history more easily than is the case with oral mythology, owning to the engrained – though largely unexamined – ideas about the supposed instability and unreliability of oral narratives in the Western cult of the written word."[136] In addition, other hearsay exceptions reflect this preference, in this case for history and science, in the existing exceptions for statements in ancient documents[137] and learned treatises.[138]

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[128] *See* Pueblo de Zia v. United States, 148 Ct. Cl. 371 (1960) (discussed below).
[129] Wally v. United States, 148 Ct. Cl. 371 (1960).
[130] *See* United States v. Washington, 384 F. Supp. at 352.
[131] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §18.04[2][e] (2005).
[132] Fed. R. Evid. 803(11).
[133] Fed. R. Evid. 803(12).
[134] Fed. R. Evid. 803(13).
[135] Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1301 (1996).
[136] Whiteley, *supra* note 81, at 407.
[137] Fed. R. Evid. 803(16).
[138] Fed. R. Evid. 803(18).

III. BIAS AGAINST NATIVE AMERICAN ORAL HISTORY AND TRADITION

Judges wield great power in acting as gatekeepers on the admissibility of evidence and testimony, however, in being human, are influenced by their paradigm or worldview. Worse yet, the decisions of some judges reflect, directly or indirectly, discrimination and bias. Some jurists have written, "[t]he testimony of Native Americans in court provides compelling evidence of cultural practices."[139] However, the testimony of tribal members, especially regarding oral traditions and history, is not always met with the *considerable respect* as was the case in *Cree v. Sandberg*.[140] There, the trial court considered Mr. William Yallup, a full-blooded Yakama Indian, as the "ultimate expert" on the tribe's interpretation of their treaty.[141] Contrast that situation with the one in *Pueblo de Zia v. United States*,[142] where the Indian Claims Commission "virtually ignored" oral accounts of history passed from father to son, despite the fact some of this oral history was corroborated by other documentary evidence.[143] The Commissions' reasoning: "all of these witnesses were young men (ages 47 to 59) who, in point of time, are far removed from the issue in question . . . ."[144] The Court of Claims reversed and remanded, chastising the Commission for its treatment of the oral history testimony: "[s]uch evidence is entitled to *some* weight; it cannot be ignored or discarded as 'literally worthless.'"[145] Interestingly, the Commission also disregarded the historical and archaeological evidence that was offered in support of the oral history testimony in finding no claim. The Court of Claims disagreed, finding the "specific documentary corroborations and the general dovetailing . . . of [the] historical and archaeological evidence and [the] testimony"[146] fulfilled the plaintiff tribes' burden of proof in establishing aboriginal title to a tract of land outside the land granted to them by the federal government.

One series of cases that has been roundly criticized for appearing biased against Native American oral tradition and history is the *Bonnichsen* line of cases. The Ninth Circuit's decision in the case has

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[139] Sherry Hutt, *The Archaeological Resources Protection Act: Charting the Progress of the Last Decade, Assessing Current and Future Issues*, 42 FED. LAW 30, 34 (1995).
[140] Cree v. Sandberg, 157 F.3d at 767.
[141] *Id.*
[142] Pueblo de Zia v. United States, 165 Ct. Cl. 501 (1964).
[143] *Id.* at 504.
[144] *Id. citing* 11 Ind. Cl. Comm., 131, 168 (1962).
[145] 165 Ct. Cl. at 505 (emphasis in original).
[146] *Id.* at 504.

been called by one commentator "the most lethal attack on Native American identity in recent American jurisprudence,"[147] due to the district and appellate courts' disregard of the oral history evidence. Much of the criticism of the decision is centered on Ninth Circuit's focus on science in the case.[148] The Ninth Circuit was critical of the Secretary of Interior's use of oral history evidence, and noted the presence of gaps in the empirical record that precluded the Secretary's finding of cultural affiliation between Kennewick Man and modern tribes. The court made this ruling despite the fact the regulations implementing NAGPRA specifically note that a finding of cultural affiliation is based on an "evaluation of the totality of the circumstances."[149] Thus, the Secretary's use of the oral history evidence was valid under the regulations. Those same regulations dictate that a finding of cultural affiliation "should not be precluded solely because of some gaps in the record."[150] It appears from the Ninth Circuit's holding that there is a point at which there are too many gaps in the record, however, the court fails to offer either a bright line rule or test that would produce consistent results in future situations or litigation. Without further discussion or clarification by the courts, the basic lesson drawn from the *Bonnichsen* line of cases is that science will tip the scales. Other commentators have reached the same conclusion.

Ashley Young wrote, "the court's analysis clearly reinforced the long-standing norm of the dominant society that science trumps culture."[151] Allison Dussias concurs with this view, noting the Native American's "understandings of kinship, ancestry, and history were treated as uncivilized and unscientific, and therefore not entitled to respect from the dominant society and its judicial system."[152] The issue of courts accepting science over other forms of evidence is a problem that apparently Congress anticipated. While prescribing a preponderance of the evidence standard, the regulations also state, "[c]laimants do not have to establish cultural affiliation with scientific certainty."[153]

Thus, the Ninth Circuit's rejection of tribal oral histories in favor of more scientific evidence appears to conflict with Congress' understanding

[147] Young, *supra* note 33, at 31.
[148] *Id.*, *see also* Dussias, *supra* note 32; S. Alan Ray, *Native American Identity and the Challenge of Kennewick Man*, 79 TEMP. L. REV. 89 (2006).
[149] 43 C.F.R. § 10.14(3)(d).
[150] *Id.*
[151] Young, *supra* note 33, at 35.
[152] Dussias, *supra* note 32, at 110.
[153] 43 C.F.R. § 10.14(3)(f).

of the circumstances faced by tribes.[154] S. Alan Ray writes that the problem was the court's lack of a "conceptual scheme . . . to understand and take seriously the testimony of present-day members of tribal claimants."[155] Thus, because the oral histories failed to provide facts similar to modern historical studies, they were dismissed as unpersuasive.[156] Commentators find this action to be contrary to Congress's intent for NAGPRA, and that rather than discounting oral history testimony, Congress in fact viewed it as one of the "relevant types of evidence to be considered without indicating that it was to be given lesser weight than other forms of evidence."[157] In affirming the district court ruling, the Ninth Circuit's decision in *Bonnichsen* is seen as contrary to the prior acceptance of oral tradition and history in United States courts.[158] The Ninth Circuit's ruling in *Bonnichsen,* of course, was welcomed by the plaintiff scientists who felt the Army Corps of Engineers and Secretary of the Interior were "anti-science,"[159] and others who object to the incorporative endorsement of minority religions that reject science and scholarship into federal law.[160]

CONCLUSION

The issue of allowing testimony on Native American oral history and traditions in the courts is not easily resolved. The same issue has caused a schism among archaeologists themselves. This type of evidence has been treated differently depending upon the facts of the case and the court hearing it. It is difficult to tell whether this is based on genuine

[154] Diane Teeman, *Is it Possible to Identify Cultural Affiliation in "Prehistory"? A NAGPRA Case Study from Nevada*. (unpublished manuscript presented at the 28th Annual Great Basin Anthropological Conference, Elko, Nevada) (manuscript on file with author) (2002).
[155] Ray, *supra* note 148, at 141.
[156] *See* Ray *supra* note 148, at 138-139; *See* also Young, *supra* note 33, at 33.
[157] Dussias, *supra* note 32, at 146. *See also* Young *supra* note 33, at 11 (discussing Congress's lack of prioritizing the types of evidence considered under NAGPRA for determining cultural affiliation indicates they should be given equal weight); 43 C.F.R. § 10.14(e).
[158] Brief for Haudenosaunee Standing Committee on Burial Rules and Regulations as Amicus Curiae Supporting Appellant-Intervenors, Bonnichsen v. United States, 367 F.3d 864 (2003) (Nos. 02-35994 and 02-35996), 2003 WL 22593879 (noting testimony by tribal elders has been sanctioned for over 20 years) (quoting Cree v. Flores, 175 F.3d at 337).
[159] Douglas W. Owlsley and Richard L. Jantz, *Archaeological Politics and Public Interest in Paleoamerican Studies: Lessons from Gordon Creek Woman and Kennewick Man*, 66 AMERICAN ANTIQUITY 565, 572 (2001).
[160] Springer, *supra* note 93, at 19-20.

concerns by some courts over the reliability of the testimony, is the result of incompatibility based on the differences between the law and the evidence's underlying cultural origins, or is simply the work of biased jurists.

One thing is certain: the Ninth Circuit's decision in *Bonnichsen* muddied the already murky waters of the ambiguous language of NAGPRA. The clash between science and oral history was highlighted by this very public dispute. It resulted in calls for amendments to clarify the wording of several provisions in NAGPRA. And the Ninth Circuit's decision in *Bonnichsen* has done little to put a definitive end to the debate: the decision has already been deemed not controlling in the *Fallon Paiute-Shoshone Tribe* case being heard in the U.S. District Court in Nevada.

While the Indian Claims Commission is no longer, and the treaty rights cases referenced here were heard 30 years ago, there are certain to be additional non-cultural resource cases that will be heard by the federal courts, some which may involve the introduction of testimony on Native American oral tradition. It is clear that an argument can be made for allowing tribal elders themselves to testify, either using a hearsay exception, or by qualifying the tribal elder as an expert witness. Attorneys for tribes will need to be prepared to use one or both strategies to have oral history testimony allowed into litigation, especially if it is critical to the tribes' arguments, as reflected in the treaty rights and cultural resources cases touched on here.

The Ninth Circuit in *Bonnichsen* showed that even oral history presented by an anthropologist was not necessarily more influential evidence than having it *straight from the elders' mouths.* While the facts of *Bonnichsen* may have not been the best for a strong argument in support of oral traditions because of the age of the remains involved, the district court in the *Fallon Paiute-Shoshone Tribe* case was not as quick to dismiss the oral history evidence.

Considering the resurgence of tribes exercising their sovereign powers and with the support of the federal government's position on tribes defining their own self identity, tribes are putting money, often gaming revenues, into programs preserving their culture, history and language. While some of this preservation may involve the writing down of narratives or interviews with tribal elders, it is likely traditional methods of passing information, through learning and listening of these narratives and

knowledge from elders, will continue. With tribes' increasing wealth due to gaming revenues, and their efforts to further broaden their economies, there will undoubtedly be more interaction between tribes and non-Indians, some of which may result in litigation in the federal courts. A tribal attorney will have to be ready to muster the arguments if oral history testimony is needed, and will have to have some luck that the judge hearing the case was more like those in *Cree v. Sandberg* than those in *Bonnichsen*.

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CASE LAW ON AMERICAN INDIANS

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UNITED STATES SUPREME COURT

1. ***Match–E–Be–Nash–She–Wish Band Of Pottawatomi Indians v. Patchak; Salazar v. Patchak****,* Nos. 11–246, 11–247, 132 S. Ct. 2199 (2012). Owner of property near site of proposed Indian casino brought action challenging decision by Secretary of the Interior to take parcel of land into trust on behalf of Indian tribe. Tribe intervened. The district court, 646 F. Supp. 2d 72, dismissed complaint on ground that resident lacked prudential standing. Resident appealed. The appellate court, 632 F.3d 702, reversed. Certiorari was granted. The Supreme Court held that: (1) United States waived its sovereign immunity, abrogating *Neighbors for Rational Development, Inc. v. Norton,* 379 F.3d 956, *Metropolitan Water Dist. of Southern Cal. v. United States*, 830 F.2d 139, *Florida Dept. of Bus. Regulation v. Department of Interior*, 768 F.2d 1248. The owner's suit is not one to quiet title under the Quiet Title Act because, even though he seeks to divest the United States of its title to land held for the benefit of a Native American tribe, he does not seek to establish his rightful title to the real property in question, and the suit therefore falls under the United States' general waiver of sovereign immunity in Section 702 of the Administrative Procedure Act. (2) Resident had prudential standing. Affirmed and remanded.

2. ***Salazar v. Ramah Navajo Chapter****,* No. 11–551, 132 S. Ct. 2181 (2012). Several Indian tribes and tribal organizations brought suit against Secretary of the Interior, seeking to collect contract support costs for activities that had to be carried on by a tribal organization as contractor to ensure compliance with terms of self-determination contracts under Indian Self-Determination and Education Assistance Act (ISDA). The district court granted summary judgment in favor of the government and plaintiffs appealed. The appellate court, 644 F.3d 1054, reversed. Certiorari was granted. The Supreme Court held that self-determination contracts between the Secretary of the Interior and Indian tribes, pursuant to which tribes undertook to provide education, law enforcement and other services normally provided by government, in exchange for commitment by the Secretary to pay costs incurred by tribes in performing their contracts "[s]ubject to the availability of appropriations," obligated government to pay full amount of contract support costs incurred by tribes once Congress made lump-sum appropriation sufficient to pay any individual contractor's contract support costs; abrogating *Arctic Slope Native Assn., Ltd. v. Sebelius*, 629 F.3d 1296. Affirmed.

OTHER COURTS

A. Administrative Law

3. ***Cahto Tribe of the Laytonville Rancheria v. Dutschke****,* No. 2:10–CV–01306, 2011 WL 4404149 (E.D. Cal. 2011). The Cahto Tribe of the Laytonville Rancheria (Tribe) sought an order under the Administrative Procedures Act (APA) vacating and reversing the Bureau of Indian Affairs' administrative decision that ordered the Tribe to re-enroll twenty-two members of the Sloan/Hecker family who were disenrolled by the Tribe in 1995. On September 19, 1995, the Tribe's General Council voted to remove from the Tribe's membership 22 individuals, members of a family with the surname Sloan, sometimes described as the Sloans/Heckers, finding that the Sloans "have been affiliated with other tribes by being included on formal membership rolls and/or . . . have been a distributee of a reservation distribution plan, namely the Hoopa/Yurok settlement and thus were ineligible for membership under Article III.A.3 of the Tribe's Articles of Association." From 1995 to 1999, BIA officials declined requests by the Sloans and others to intervene and maintained that the Tribe's disenrollment action was an internal matter. The BIA did not act on Gene Sloan's appeals until 2009. The Superintendent wrote to the Tribe and asked that the Tribe reconsider its disenrollment decision. As a result, the Tribe agreed to attempt to resolve the matter internally. The court denied Plaintiff's motion for summary judgment, granted Defendants' motion for summary judgment, and affirmed the BIA's 2009 Decision.

4. ***Wilton Miwok Rancheria v. Salazar****,* Nos. C–07–02681, C–07–05706, 2011 WL 4407425 (N.D. Cal. 2011). On February 28, 2007, the Me–Wuk Indian Community of the Wilton Rancheria filed suit against various federal officials in District Court, alleging violations of the California Rancheria Act ("Rancheria Act" or "the Act"), Pub. L. 85-671, 72 Stat. 619, amended by Pub. L. 88–419, 78 Stat. 390. The Me–Wuk Plaintiffs sought federal recognition of the Wilton Rancheria and requested that certain land be taken into trust by the federal government on the tribe's behalf. On June 4, 2009, the Existing Parties filed a Stipulation for Entry of Judgment ("Stipulated Judgment"). The Court approved the stipulation on June 5, 2009, and final judgment was entered on July 16, 2009, nunc pro tunc to June 8, 2009. *MeWuk Indian Community of the Wilton Rancheria v. Salazar, et al.*, Dkt. Nos. 33, 34; *Wilton Miwok Rancheria et al. v. Salazar, et al.,* Dkt. Nos. 61, 62. In the Stipulated

Judgment, the United States admits that it failed to comply with the Rancheria Act in terminating the Wilton Rancheria and distributing its assets. It agrees, among other things, to restore federal recognition of the Wilton Rancheria and to accept in trust certain lands formerly belonging to the tribe. Plaintiffs agree, among other things, to release the federal government from liability arising out of violations of the Rancheria Act, to discharge the United States Department of Health and Human Services from any claims arising after the implementation of the Rancheria Act and before the restoration of recognition, and to dismiss their claims with prejudice. The Stipulated Judgment also provides that this Court will retain jurisdiction, upon motion by any party, to determine whether a party has "materially violated" the terms of the judgment. The Stipulated Judgment contains a number of specific provisions concerning the process for determining membership in the Wilton Rancheria. Of particular significance to the Proposed Intervenors is paragraph 6, which states: "The Interim Tribal Council shall develop the Tribal Constitution that shall provide for membership criteria based on the Tribe's historical documentation, which may include the Census documents of 1933/1935 and 1941." The Existing Parties and the County and City entered into negotiations for the purpose of modifying the Stipulated Judgment. On June 10, 2011, as the negotiations neared their successful completion, the Proposed Intervenors filed the instant motion. Proposed Intervenors represent individuals formerly associated with the Plaintiffs who claim that they were "systematically excluded from the organization process" following approval of the Stipulated Judgment. Motion for Intervention. They seek to protect their interest in "potential membership" in the Wilton Rancheria. According to their moving papers, the census documents referenced in paragraph 6 of the Stipulated Judgment "form the primary basis from which the rights to membership of the Historic Families would be derived." They alleged that the Interim Tribal Council, which has governed the Wilton Rancheria since its restoration, elected not to base membership determinations on the Census documents, the effect of which was to exclude the Proposed Intervenors from membership in the tribe. They argued that their exclusion violates the Stipulated Judgment, because "the interpretation of the word 'may' as permissive . . . is contrary to the purpose of that language." The court denied the Motion for Intervention without Prejudice.

5. ***Muwekma Ohlone Tribe v. Salazar***, No. 03–1231, 813 F. Supp. 2d 170 (2011). Native American group brought action against Department of the Interior and agency officials, challenging decision

declining to grant federal recognition to group as Native American tribe. Parties cross-moved for summary judgment. The District Court held that: (1) claim alleging unlawful termination of federal recognition was time-barred; (2) determination that group did not fulfill criteria for federal recognition was not arbitrary and capricious; (3) group lacked trust relationship with government sufficient to create fiduciary duty; (4) group lacked protected property interest in its prior acknowledgement; (5) agency was not required to provide hearing to group; and (6) group failed to show that it was "similarly situated" for equal protection purposes. Defendants' motion granted.

6. ***Wyandotte Nation v. Salazar****,* No. 11-1361, 2011 WL 5841611, 825 F. Supp.2d 261 (2011). Federally recognized Indian tribe sought writ of mandamus to compel the Secretary of Department of Interior to accept trust title to land, pursuant to Land Claim Settlement Act. Defendant moved to transfer venue. The district court held that: (1) public interest factors favored transfer to Kansas, and (2) private interest factors favored transfer to Kansas. Motion granted.

7. ***South Dakota v. United States Department of Interior****,* No. 11-1745, 665 F.3d 986 (8th Cir. 2012). State brought action challenging Secretary of Interior's decision to accept transfer of land into trust for benefit of Indian tribe. The district court, 775 F. Supp. 2d 1129, granted summary judgment in favor of the Secretary, and State appealed. The appellate court held that: (1) State had Article III standing, but (2) State lacked standing to bring a constitutional due process claim. Appeal dismissed.

8. ***Chalepah v. Salazar****,* No. CIV–11–99, 2012 WL 728280 (W.D. Okla. 2012). This matter is an action pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 706, seeking judicial review of a final determination of the United States Department of Interior (DOI) recognizing certain tribal officials after a tribal leadership election. The Apache Tribe of Oklahoma (Tribe) is governed by a Tribal Council that consists of all tribal members who are 18 years of age or older. The power to transact business and speak for the Tribe is delegated to an elected business committee, commonly known as the Apache Business Committee (ABC). On June 19, 2010, during the Tribe's Annual Tribal Council meeting, the Tribe voted to endorse its March 20, 2010 election. On June 25, 2010, an Interlocutory Order was issued by the Assistant Secretary instructing the Regional Director to determine the validity of the Tribal Council meeting. The Assistant Secretary's Interlocutory Order also

delegated to the Regional Director the authority to declare recognition of the winners of the March 20, 2010 election as the new Tribal Council and declare the Election Board's appeal moot. On June 29, 2010, the Superintendent submitted proposed Findings of Facts with exhibits to the Regional Director recommending recognition of the Tribal Council meeting and its vote to recognize the March 20, 2010 election results. On July 1, 2010 the Acting Regional Director found valid both the Tribal Council meeting and the 87 to 5 vote by the Council to certify those persons elected during the March 20, 2010 election. The Acting Regional Director also rendered the Election Board's appeal moot. Plaintiffs now seek review of the Department of the Interior's decision certifying the March 20, 2010 election. The court affirmed the Department's decision and denied Plaintiffs' Motion for Summary Judgment.

9. ***California Valley Miwok Tribe v. Salazar****,* No. 11–160, 2012 WL 987994 281 F.R.D. 43 (2012). (From the Opinion) "This matter is a dispute over the U.S. Department of the Interior's determination of the legitimate government and membership of the California Valley Miwok Tribe (Tribe), a federally recognized Indian tribe. Defendants are Secretary of the Interior Ken Salazar, Assistant Secretary for Indian Affairs Larry Echo Hawk, and Director of the Bureau of Indian Affairs Michael Black. Plaintiffs bring suit individually and on behalf of the Tribe and its Tribal Council, arguing that the defendants' decision to recognize a General Council led by Sylvia Burley as the legitimate government of the Tribe, and to discontinue efforts to adjudicate the status of other putative tribal members, constituted arbitrary and capricious agency action, in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A), and also violated due process and the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301, *et seq*. Another group representing the Tribe, as organized in the form of the General Council, moves to intervene as a defendant in this action for the limited purpose of filing a motion to dismiss, arguing that intervention is necessary to protect its fundamental interests in defending its sovereignty and defining its citizenship. Because the proposed intervenor satisfies the requirements for intervention as of right under Federal Rule of Civil Procedure 24(a)(2), the motion to intervene will be granted."

10. ***Fletcher v. United States***, No. 02–CV–427, 2012 WL 1109090 (N.D. Okla. 2012). This matter was before the court on the Motion to Dismiss plaintiffs' Third Amended Complaint, filed by defendants the United States of America, the Department of the Interior, Kenneth Salazar in his official capacity as Secretary of the Interior, the Bureau of

Indian Affairs, and Larry EchoHawk in his official capacity as Assistant Secretary of the Interior– Indian Affairs (Federal Defendants). The complaint asserted four causes of action: (1) a claim that the Federal Defendants violated their right to political association and participation in the Osage government; (2) a claim that the Federal Defendants breached their trust responsibilities by (a) eliminating the plaintiffs' right to participate or vote in Osage tribal elections, and (b) allowing mineral royalties to be alienated to persons and entities not of Osage blood; (3) a Fifth Amendment takings claim; and (4) a claim that the federal regulations regarding the Osage Tribe violated their right to participate in their government and the defendants' trust responsibilities. The court granted Defendants' Motion to Dismiss.

11. ***County of Charles Mix v. United States Department of the Interior***, No. 11-2217, 2012 WL 1138269, 647 F. 3d 898 (8th Cir. 2012). County filed suit, under Administrative Procedure Act (APA), against Department of the Interior (DOI) to obtain declaratory and injunctive relief from decision of Bureau of Indian Affairs (BIA), affirmed by Interior Board of Indian Appeals, to grant Indian tribe's request to acquire 39 acres of on-reservation land in trust for tribe, pursuant to Indian Reorganization Act. The district court, 799 F. Supp. 2d 1027, granted DOI summary judgment. County appealed. The appellate court held that: (1) DOI's acquisition of land in trust did not violate Republican Guarantee Clause; (2) county's challenge to DOI's jurisdiction to consider tribe's request was not reviewable; and (3) DOI's acquisition of land in trust was supported by rational basis. Affirmed.

12. ***Cloverdale Rancheria of Pomo Indians of California v. Salazar,*** No. 5:10–1605, 2012 WL 1669018 (N.D. Cal. 2012). This action arises out of an internal political dispute within the Cloverdale Rancheria of Pomo Indians of California ("the Cloverdale Rancheria" or "the Tribe"). Plaintiffs claim that they are members of the Tribe's rightful governing body, that Defendants improperly have refused to deal with them, and that instead Defendants have dealt with a competing governing body that lacks authority to act on behalf of the Tribe. Plaintiffs allege claims under the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq*., and the Indian Self–Determination and Education Assistance Act (ISDA), 25 U.S.C. § 450 *et seq*. Defendants move to dismiss the operative Second Amended Complaint (SAC) for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P 12(b)(1) and for lack of standing pursuant to Fed. R. Civ. P 12(b)(6). In a separate motion, the "Cloverdale Rancheria of Pomo Indians of California" ("Proposed Intervenor"), as represented by

the governing body that has been recognized by Defendants, seeks leave to intervene in the action. The motion to intervene was terminated as moot, and the action was dismissed with prejudice.

13. ***Allen v. United States***, No. C 11–05069, 2012 WL 1710869, 871 F.Supp.2d 982 (2012). This action was filed challenging the BIA's failure to call a Secretarial election for the Ukiah Valley Pomo Indian Tribe under the Indian Reorganization Act (IRA). The complaint alleges that defendants violated the Fifth Amendment, the IRA and the Administrative Procedure Act, and sought declaratory and injunctive relief. The complaint claimed defendants violated the Fifth Amendment and the APA by unreasonably delaying the calling and conducting of an election under the provisions of the IRA. Plaintiffs also claimed that defendants acted in direct violation of the IRA by requiring petitioners to be a federally recognized tribe in order to be eligible for an election under the IRA, and by denying services and benefits to petitioners by preventing them from organizing a tribal government. Plaintiffs sought a declaration that the IRA does not require that Indian tribes be federally recognized in order for tribes to be eligible for an IRA election, as well as a declaration that the Ukiah Valley Pomo Indian Tribe is in fact a "tribe" under the definition set forth in the IRA. Plaintiffs' asserted the following bases for jurisdiction: (i) 28 U.S.C. 1331; (ii) 28 U.S.C. 1361; (iii) 28 U.S.C. 1337; (iv) Article VI, cl. 2 of the Constitution; and (v) the Fifth Amendment. A preliminary question was whether the government has waived its sovereign immunity. Plaintiffs asserted that the government has waived sovereign immunity pursuant to the APA. The government argued that there has been no final agency action, and that without such final action, its sovereign immunity remains intact. After the administrative record was lodged, the government filed a motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim for relief. Plaintiffs filed a motion for summary judgment. This action presents a complex problem involving the intersection of judicial authority over the right to tribal organization under the IRA and administrative authority granted to the Department of the Interior's Bureau of Indian Affairs to determine whether a given group is entitled to organize under the IRA. Under the facts of this dispute, plaintiffs cannot satisfy the IRA's definition of "tribe" and cannot therefore invoke its provisions as the basis for waiving the government's sovereign immunity. Plaintiffs also have failed to exhaust administrative remedies because they have not appealed the BIA's decision to the Interior Board of Indian Appeals (IBIA), nor have they followed the BIA's regulations to appeal agency inaction. Absent such exhaustion, the Court is without jurisdiction to hear their

claims. The government's motion to dismiss was granted and plaintiffs' motion for summary judgment was denied as moot.

14. ***Alto v. Salazar****,* No. 11-2276, 2012 WL 215054 (S.D. Cal. 2012). Plaintiffs, collectively known as the "Marcus Alto Sr. Descendants," sought declaratory and injunctive relief from a January 28, 2011 order issued by Defendant Assistant Secretary Echo Hawk finding that the Marcus Alto Sr. Descendants should be excluded from the San Pasqual Band of Mission Indians (Tribe) membership roll. Before the Court was the Tribe's motion to dismiss under Fed. R. Civ. P 12(b)(7) for failure to join the Tribe as a required and indispensable party within the meaning of Fed. R. Civ. P 19 or alternatively to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P 12(b)(1). Plaintiff's original complaint alleged four causes of action: (1) declaratory relief based on the doctrine of *res judicata;* (2) declaratory relief on the basis that Defendant Echo Hawk violated the enrolled Plaintiffs' right to procedural due process; (3) declaratory relief and reversal of the agency's January 28, 2011 order based upon arbitrary and capricious action; and (4) injunctive relief based on the agency's alleged failure to act. While the Motion for Preliminary Injunction was pending, the Tribe filed a request with the Court to appear specially and an accompanying motion to dismiss the action under Federal Rule of Civil Procedure 19. The Court denied the Tribe's request to appear specially, but allowed the Tribe's motion to be docketed as an amicus curiae brief. The Court declined to dismiss the action under Fed. R. Civ. P 19, finding that complete relief could be accorded in the Tribe's absence, that the Tribe's interest may be adequately represented by the federal government, and that the federal government is unlikely to suffer inconsistent obligations in the Tribe's absence. The Court granted Plaintiffs' Motion for Preliminary Injunction, and enjoined the Defendants from removing Plaintiffs from the Tribe's membership roll or taking any further action to implement the Assistant Secretary's January 28, 2011 order. On January 12, 2012, Assistant Secretary Echo Hawk issued a memorandum order to the BIA Regional Director and BIA Superintendent. The Assistant Secretary directed that because the Alto descendants are deemed to be members of the Band, they remain entitled to all rights and benefits enjoyed by such members, including participation on tribal elections, provision of health care services, and per capita distribution of income under the Band's Revenue Allocation Plan. The Court granted Plaintiffs leave to file a First Amended Complaint (FAC). The FAC added a Fifth Cause of Action for declaratory and injunctive relief, seeking pay-out of Indian Gaming Regulatory Act and

Revenue Allocation Plan funds withheld between January 29, 2011 and January 12, 2012. The Tribe thereafter filed a Motion to Intervene pursuant to Fed. R. Civ. P 24(a). Because of the Court's preliminary injunction order, the Assistant Secretary's January 23, 2012 Memorandum Order, and Plaintiff's newly added Fifth Cause of Action raised additional issues regarding the scope of the Court's jurisdiction to adjudicate the issues in the case, the Court granted the Tribe leave to intervene for purposes of filing the current motions. For the reasons set forth herein, the Court denied in part and deferred ruling in part on the Tribe's motion to dismiss. The Court denied the Tribe's motion to dissolve the preliminary injunction.

15. ***Jech v. Department Of Interior***, No. 11–5064, 2012 WL 2308715, 483 Fed.Appx. 555 (10th Cir. 2012). Not selected for publication in the Federal Reporter. Plaintiffs appealed the district court's order dismissing their complaint for failure to exhaust administrative remedies. They sued the United States of America, the Department of the Interior (DOI) and its Secretary, and the Bureau of Indian Affairs (BIA) and its Secretary. They sought injunctive and declaratory relief that would require the DOI to conduct the elections for Principal Chief, Assistant Principal Chief, and Tribal Council of the Mineral Estate (collectively, Mineral Estate Officials) of the Osage Tribe of Indians (Osage Tribe). Plaintiffs are owners of interests in the Osage Mineral Estate. These interests, called "headrights," entitle the owner to receive mineral revenue distributions from production of the Mineral Estate. The Osage Allotment Act of 1906, as amended ("1906 Act"), created the Mineral Estate, identified the original shareholders, and provided that headrights would pass to their heirs, devisees, and assigns. *See* Act of June 28, 1906, Pub. L. No. 59–820, 34 Stat. 539 (1906). The 1906 Act also prescribed the form of the Osage Tribal government, including the election of Chiefs and a Tribal Council. Under the 1906 Act, only shareholders were allowed to vote and the tribal officials also had to be shareholders. In 2004, Congress enacted the Reaffirmation of Certain Rights of the Osage Tribe, Pub. L. No. 108–431, 118 Stat. 2609 (2004) ("Reaffirmation Act"). Congress recognized that many people were considered Osage, but under the 1906 Act only shareholders were "members" of the Osage Tribe. The Reaffirmation Act clarified that "legal membership" in the Osage Tribe meant headright owners, id. § 1(a)(2) & (3), and reaffirmed "the inherent sovereign right of the Osage Tribe to determine its own form of government," id. § 1(b)(2). Following enactment of the Reaffirmation Act, the Osage Tribe adopted a new Constitution of the Osage Nation.

The new Constitution changed the election rules to allow all adult members of the Osage Tribe to vote in tribal elections, even if they were not headright owners. Concerned that their headrights would be governed by Mineral Estate Officials who were neither shareholders nor elected solely by shareholders, various shareholders wrote to the BIA and demanded that it conduct the 2006 election for the governing body of the Mineral Estate pursuant to the 1906 Act, i.e., allow only shareholders to vote. *See* 25 C.F.R. Part 90 (governing DOI's conduct of Osage elections). The BIA responded by issuing several letters, all refusing the demands by plaintiff Tillman and others to conduct the election, stating that the new Osage Constitution was consistent with the Reaffirmation Act. Plaintiffs did not appeal the BIA's decision to the Interior Board of Indian Appeals (IBIA), but instead filed the underlying lawsuit. A magistrate judge recommended granting defendants' motion to dismiss due to plaintiffs' failure to exhaust administrative remedies. The magistrate judge reasoned that plaintiffs were required to file an appeal with the IBIA and that because they failed to do so, "the BIA's decision [was] not eligible for judicial review."

The district court conducted a de novo review and adopted the magistrate judge's recommendation to grant defendants' motion to dismiss. The appellate court affirmed the judgment of the district court.

B. Child Welfare Law and ICWA

16. ***In re M.H.***, Nos. 1-11-0196, 1-11-0259, 1-11-0375, 2011 WL 3587348, 353 Ill.Dec. 648 (2011). State sought permanent termination of mother and father's parental rights to Indian child and appointment of a guardian with the right to consent to child's adoption. Tribe petitioned to transfer the proceedings to the tribal court. The Circuit Court denied tribe's petition to transfer, terminated mother and father's parental rights on findings of unfitness, and determined that it was in child's best interest to be adopted by her foster mother. Mother, father, and tribe all appealed. The appellate court held that: (1) transferring proceeding for termination of parental rights to tribal court constituted an undue hardship and, thus, good cause not to transfer; (2) proceeding for termination of parental rights was at an advanced stage when tribe petitioned to transfer proceeding to tribal court, and thus good cause existed to not transfer case; (3) child's foster home placement was in compliance with the Indian Child Welfare Act of 1978; (4) State met its burden of establishing by a preponderance of the evidence active efforts to provide remedial services and rehabilitative programs; and (5) trial court did not err in considering

the risk of emotional or physical harm reunification would present to child and basing its decision to terminate parental rights in part on that factor. Affirmed.

17. ***Yancey v. Thomas****,* No. 10–6239, 441 Fed. Appx. 552 (10th Cir. 2011). Biological father filed action against adoptive parents of father's Indian child, challenging validity of Oklahoma court's order terminating his parental rights under Indian Child Welfare Act (ICWA). The district court granted parents' motion to dismiss, and father appealed. The appellate court held that: (1) *Younger* abstention doctrine did not apply to biological father's challenge to final order of Oklahoma court terminating his parental rights, and (2) doctrine of res judicata barred federal district court's consideration of biological father's challenge to order terminating his parental rights under ICWA. Affirmed.

18. ***Welfare of R.S.***, No. A10-1390, 2011 WL 5061532, 805 N.W.2d 44 (2011). After parental rights to an Indian child living in Fillmore County were involuntarily terminated, the White Earth Band of Ojibwe (Band) petitioned for transfer of the ensuing pre-adoptive placement proceedings to its tribal court. The district court granted the Band's motion and the court of appeals affirmed. Because it concludes that transfer of pre-adoptive proceedings to tribal court is not authorized by federal or state law, the Supreme Court reversed.

19. ***In re J.W.C.****,* No. DA 11 0227, 2011 WL 6176075, 363 Mont. 8, 265 P.3d 1265 (2011). Mother appealed from order of the District Court terminating her parental rights to children, who were members of Indian tribe. The Supreme Court held that district court should have transferred jurisdiction over case to the Tribal Court, or determined after a hearing that there was good cause not to do so. Reversed and remanded.

20. ***Merrill v. Altman***, No. 25950, 2011 WL 6849067, 807 N.W.2d 821 (2011). Maternal grandparents of Indian child, who had been awarded permanent guardianship of child by Tribal Court, filed motion seeking to have their guardianship recognized in Circuit Court, which had previously issued child custody order for child. The Circuit Court denied motion. Grandparents appealed. The Supreme Court held that Tribal Court lacked exclusive jurisdiction over guardianship petition of child's maternal grandparents under exclusive jurisdiction provision of the Indian Child Welfare Act. Affirmed**.**

21. ***In re T.S.W.***, No. 104,424, 2012 WL 1563903, 294 Kan. 423, 276 P.3d 133 (2012). State adoption agency filed petition to terminate Native American father's parental rights to child born to non-Native American mother. Tribe petitioned to intervene and filed answer and counterclaim. Agency filed petition to deviate from Indian Child Welfare Act's (ICWA) placement preference. The District Court terminated father's parental rights, and then, in subsequent order, granted agency's petition to deviate from ICWA's placement preference requirements. Tribe appealed from order granting deviation. The Supreme Court held that: (1) tribe's petition for placement preference under ICWA was not de facto adoption proceeding, for purposes of tribe's right to appeal from order granting deviation from preference; (2) The Supreme Court lacked statutory authority over appeal from non-final order granting agency's petition for deviation of placement preference under ICWA; (3) order was collaterally appealable; (4) ICWA's parental placement preference for child applied to adoption of child born to non-Indian mother who stated preference for child's placement with non-Native American family; (5) agency was prohibited from grafting requirement onto ICWA's parental placement preference tribe members interested in adoption to show proof of ability to pay agency's $27,500 fee and mother's preference for placement of child; and (6) mother's wish that child not be placed with any member of father's family, together with her wish that child be placed with non-Native American family, by itself, was not good cause to deviate from ICWA's placement preference statute. Reversed.

C. Contracting

22. ***Southern Ute Indian Tribe v. Sebelius***, Nos. 09–2281, 09–2291, 657 F.3d 1071 (10th Cir. 2011). Indian tribe brought suit, under Indian Self-Determination and Education Assistance Act (ISDA), challenging declination of Department of Health and Human Services (HHS) to enter into self-determination contract with tribe for reservation health services, asserting claim under Administrative Procedure Act (APA), and seeking damages and injunctive relief. The district court, 497 F. Supp. 2d 1245, granted tribe partial summary judgment as to self-determination contract and directed parties to draft form of injunctive relief, and subsequently issued second order in favor of HHS's approach as to contract start date and as to payment of contract support costs. Tribe appealed second order. The appellate court, 564 F.3d 1198, dismissed for lack of jurisdiction. On remand, the district court issued a final order, directing the parties to enter a self-determination contract including HHS's proposed language regarding the contract start date and contract support

costs, and denying Tribe's request for damages. Cross-appeals were taken. The appellate court held that: (1) HHS was not permitted to decline self-determination contract with tribe on basis that available appropriations were insufficient; and (2) start date for self-determination contract was date that tribe assumed operation of clinic. Affirmed in part and reversed in part.

23. ***Engage Learning, Inc. v. Salazar****,* No. 2011-1007, 660 F.3d 1346 (2011). Service provider submitted claim under Contract Disputes Act (CDA) for unpaid educational training and support services provided to schools run by Bureau of Indian Affairs. Bureau denied claim. Provider appealed to the Civilian Board of Contract Appeals, 2010 WL 2484235, which granted government's motion to dismiss for lack of subject matter jurisdiction. Provider appealed. The appellate court held that: (1) in a matter of first impression, service provider's allegations were sufficient to establish that denial of claim was "relative to" express contract with an executive agency, and thus Civilian Board of Contract Appeals had subject matter jurisdiction over provider's appeal of denial of claim; (2) Civilian Board of Contract Appeals was not permitted to resolve genuine issues of fact as to whether service provider had contract with Bureau on motion to dismiss for lack of subject matter jurisdiction; but (3) service provider failed to state claim for unpaid services on ground that services were rendered pursuant to contract authorized under No Child Left Behind Act. Affirmed in part, vacated in part, and remanded.

24. ***Western Sky Financial L.L.C. v. Maryland Commissioner of Regulation****,* No. 11-1256, 2011 WL 4929485 (D. Md. 2011). (From the Opinion) "Western Sky Financial, LLC, Great Sky Finance, LLC, PayDay Financial, LLC, and Martin A. Webb (plaintiffs), sued the Maryland Commissioner of Financial Regulation (CFR), for declaratory relief. Martin Webb, a member of the Cheyenne River Sioux Tribe who resides on the Cheyenne River Reservation, owns Western Sky Financial, LLC, Great Sky Finance, LLC, and PayDay Financial, LLC, internet-based loan companies. All the plaintiffs reside on the Reservation. The three companies state in their loan agreements that: (1) the agreement is subject to the exclusive laws of the Cheyenne River Sioux Tribe, (2) the debtor consents to the exclusive jurisdiction of the Cheyenne River Sioux Tribal Court, (3) the agreement is governed by the Indian Commerce Clause of the U.S. Constitution and Cheyenne River Sioux Tribe laws, and (4) the company is subject to the laws of no state." The court granted the CFR's motion to dismiss.

25. ***Los Coyotes Band of Cahuilla & Cupeno Indians v. Salazar****,* No. 10cv1448, 2011 WL 5118733 (S.D. Cal. 2011). This case arose from the Defendant Bureau of Indian Affairs (BIA), Office of Justice Services' (OJS) denial of Plaintiff's request for a law enforcement funding contract under the Indian Self-Determination and Educational Assistance Act ("ISDEAA"), 25 U.S.C. § 450 *et seq*., commonly known as "638 contracts." Before the court was Plaintiff's Motion for Summary Judgment and Defendants' Cross Motion for Summary Judgment. The court granted Plaintiff's Motion for Summary Judgment in part and denied in part, and granted Defendants' Cross Motion for Summary Judgment in part and denied in part.

26. ***Jefferson State Bank v. White Mountain Apache Tribe***, No. CV 11–8100, 2011 WL 5833831 (D. Ariz. 2011). Before the Court was Defendant White Mountain Apache Tribe's motion to dismiss the complaint for lack of subject matter jurisdiction. From 2005 to 2007, Defendant entered into a series of municipal finance lease agreements with Lehigh Capital Access for the acquisition of vehicles and equipment. Lehigh then assigned a number of the lease agreements to Jefferson. Each lease agreement included an addendum containing identical terms governing dispute resolution whereby either party would submit a claim against the other "for binding arbitration to a court of competent jurisdiction." The arbitration procedures in the addendum outlined a process for convening an arbitration hearing and issuing an award. There were no terms in the addendum, or in the lease agreement or other documents governing the transaction, by which the parties agreed to an outside arbitration service or to be bound by any designated arbitration rules. Similarly, there were no terms by which the parties agreed to the jurisdiction of a designated court or agreed to any specific court enforcement powers. On December 31, 2010, prior to filing its Complaint, Jefferson sent a Notice of Acceleration to Defendant claiming default under the Contract Documents. Although the parties began discussions to address the alleged default, on February 9, 2011, Jefferson submitted a demand that the dispute be submitted for arbitration. On May 4, 2011, Jefferson filed a petition for arbitration with the American Arbitration Association ("AAA"). Because the parties had not agreed to use its services, AAA asked Defendant to consent to a proceeding. On June 14, 2011, AAA gave notice to the parties that it closed the arbitration file because Defendant had not given its consent. Jefferson filed a complaint on June 28, 2011, and an amended complaint on July 8, 2011, seeking injunctive relief and declaratory judgment. Specifically, Jefferson seeks an

order compelling the Defendant to "comply with its contractual duties and obligations under the terms of the Municipal Leases . . . to arbitrate the issues between the parties before a three member arbitration panel, which arbitrators have been selected in accordance with the express written terms of the Municipal Leases." The court found that Jefferson had not shown that its claims against Defendant are subject to federal question or diversity jurisdiction and that the case must be dismissed for lack of subject matter jurisdiction. The court dismissed Jefferson's complaint with prejudice.

27. ***Yakama Nation Housing Authority v. United States***, No. 08–839C, 102 Fed. Cl. 478 (2011). Indian nation's housing authority brought action against United States, alleging that Department of Housing and Urban Development (HUD) improperly reduced Indian Housing Block Grants that authority received under Native American Housing and Self–Determination Act (NAHASDA) over course of several years and seeking to account for and recover purportedly withheld grant funds. Government moved to dismiss for lack of subject matter jurisdiction and for failure to state claim. The court held that: (1) authority's other district court filings did not divest court of jurisdiction; (2) some of authority's claims were time–barred; (3) NAHASDA was money–mandating statute for purposes of court's jurisdiction; (4) Anti-Deficiency Act did not bar relief on authority's claims; (5) Congress did not bar court's jurisdiction under NAHASDA; and (6) enforceable trust relationship existed between authority and HUD. Motion granted in part and denied in part.

28. ***United States v. Pecore***, Nos. 10 2676, 10 3599, 2011 WL 6880632, 664 F.3d 1125 (7th Cir. 2011). United States filed civil action against tribal forest manager and fire management officer alleging violation of False Claims Act (FCA). Defendants prevailed after jury trial. Defendants moved for award of attorney's fees under Equal Access to Justice Act (EAJA), or alternatively, sanctions. The district court, 2010 WL 2465505, denied motion. Defendants appealed. The appellate court held that: (1) alleged violation of internal agency policy guidelines served only as probative evidence that government did not file suit in good faith; (2) case involving contract performance does not necessarily foreclose FCA liability; (3) district court did not abuse its discretion in finding that government's motive theory was substantially justified; (4) district court did not abuse its discretion in finding that government had reasonable grounds for believing that defendants had knowingly submitted false invoices; (5) government did not abdicate its duty to diligently investigate FCA claims by giving greater deference to its own expert; and (6) district

court did not abuse its discretion in rejecting request for sanctions for government's refusal to admit genuineness of tribal invoices, completion maps, and accomplishment memoranda. Affirmed.

29. ***State of Colorado v. Western Sky Financial, L.L.C***., No. 11–00887, 2011 WL 6778797, 845 F.Supp.2d 1178 (2011). Plaintiff moved to remand this case to state court for lack of federal question jurisdiction. Plaintiffs filed the case in the Denver District Court, alleging that Western Sky Financial, LLC, a South Dakota limited liability company, had offered, through the Internet, to make loans to Colorado consumers in amounts ranging from $400 to $2,600 with annual percentage interest rates of approximately 140 to 300%. Martin A. Webb is alleged to be Western Sky's sole manager. When individuals apply for loans with Western Sky, they sign a document called "Western Sky Consumer Loan Agreement." This agreement states that it is "governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe." Western Sky's website states that all loans "will be subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation," and that borrowers "must consent to be bound to the jurisdiction of the Cheyenne River Sioux Tribal Court, and further agree that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation." They add that Mr. Webb is an enrolled member of the Cheyenne River Sioux Tribe (although his company is neither owned nor operated by the Tribe**)**. They argue from those facts that "Colorado's purported state-law claims in this case are completely preempted by federal law." In support of that position they cite a number of cases for the proposition that "Colorado may not regulate commercial activity on Indian lands in South Dakota" and other cases for the proposition that the complaint "necessarily raises a dispositive, substantial, and disputed question of federal law." The court granted Plaintiff's motion to remand. The case was remanded to the District Court for the City and County of Denver. Plaintiffs were awarded costs including attorney's fees.

30. ***Quantum Entertainment, LTD. v. United States Department Of Interior, Bureau of Indian Affairs***, No. 11–47, 2012 WL 989594, 848 F.Supp.2d 30 (2012). This case was before the court on the parties' cross-motions for summary judgment. Santo Domingo Pueblo (Pueblo) is a Native American pueblo, or tribal community, located in New Mexico. Kewa Gas Limited (Kewa) is a Registered Indian Tribal Distributor (RITD) that operates the Pueblo's retail gas station, its gas

distribution business and related businesses. In August 1996, the plaintiff, QEL, entered into a management agreement ("Agreement") with the Pueblo and Kewa. The agreement authorized the plaintiff to manage Kewa's gas distribution business and to be compensated at a rate of 49% of income, plus bonuses. The agreement was to last for ten years, but the plaintiff had the option at the end of the first decade to renew it. In March 2003, however, the Governor of the Pueblo requested that the BIA review the agreement, believing that it was "far too lucrative for" QEL, and adversely "impacted the tribe . . . financially." In October 2003, the BIA determined that the agreement was subject to review under Old Section 81 because the parties entered into the agreement before New Section 81 was enacted. The BIA further reasoned that because the agreement had never been approved by the Secretary of the DOI, Old Section 81 dictated that the agreement had "never been legally valid and any monies received by [the plaintiff] pursuant to [the agreement] were [therefore] unauthorized." The plaintiff appealed the BIA's decision to the Board, which upheld the BIA's findings in March 2007. In December 2010, the Board issued a more developed opinion that reaffirmed its previous decision. In its 2010 opinion, the Board determined that Old Section 81 should apply to the agreement because applying New Section 81 would have an impermissible retroactive effect. Specifically, the Board concluded, applying New Section 81 would create contractual rights and duties for the parties that had not existed before. The Board also held that under Old Section 81, the agreement required DOI approval because it was related to Native American lands. The defendant filed a motion for summary judgment, arguing that the Board's revised opinion satisfied the APA. In response, the plaintiff filed a cross-motion for summary judgment, contending that the Board erred in making its determinations. The court granted the defendant's motion for summary judgment and denied the plaintiff's cross-motion for summary judgment.

31. ***Absentee Shawnee Housing v. United States Department of Housing and Urban Development***, No. 08–1298, 2012 WL 3245953 (W.D. Okla. 2012). Plaintiffs, The Absentee Shawnee Housing Authority (ASHA) and the Housing Authority of the Seminole Nation of Oklahoma (HASNOK), filed this action under the Administrative Procedure Act, 5 U.S.C. §§ 701–706 (APA), against the United States Department of Housing and Urban Development (HUD), claiming the agency wrongfully withheld and recaptured grant funds paid to plaintiffs pursuant to the Native American Housing and Self–Determination Act of 1996, 25 U.S.C. §§ 4101–4243 (NAHASDA or Act). Plaintiffs challenge a

regulation HUD promulgated in 1998 as part of the funding allocation formula the agency used to distribute housing funds from 1998 through 2008. As the result of a nation-wide audit conducted by HUD's Office of Inspector General in 2002, HUD discovered that numerous housing entities, including plaintiffs, had owned or operated fewer dwelling units than they had reported on their Formula Response Forms and were receiving or had received funds for dwelling units they no longer owned or operated. HUD demanded a refund of the overpayments and proposed a means of repayment. The ASHA partially repaid HUD and then filed this lawsuit with HASNOK. Plaintiffs claim that HUD, by relying on 24 C.F.R. § 1000.318(a), breached its trust responsibility to plaintiffs and improperly eliminated certain housing units from the calculation of their current units through the end of fiscal year 2008. Even if the regulation was valid, plaintiffs assert that HUD erred in its enforcement in certain instances by depriving them of funding for units that they continued to own or operate, having delayed or forgone conveyance "legitimately and in the exercise of its self-determination." Plaintiffs also contend they were not afforded due process prior to the reductions and recapture. Finally, plaintiffs assert that, even if they were overfunded by HUD for any of the fiscal years in question, HUD lacks the authority to set-off future IHBG in the amount of the overfunding, the statute then in effect prohibited the recapture of IHBG funds once they were expended on low-income housing activities and any remedial actions by HUD were subject to a three year limitations period. Having rejected plaintiffs' argument that HUD acted arbitrarily and capriciously in promulgating and implementing 24 C.F.R. § 1000.318(a), and their other claims, plaintiffs request for relief is denied.

D. Employment

32. ***Larimer v. Konocti Vista Casino Resort, Marina & RV Park***, No. C 11-01061, 2011 WL 4526023, 814 F.Supp.2d 952 (2011). Discharged casino employee brought action against employer, a federally-recognized Indian tribe, and employer's chief executive officer (CEO), alleging defendants failed to pay overtime wages in violation of the Fair Labor Standards Act (FLSA) and breached parties' employment contract. Defendants moved to dismiss. The court held that: (1) employer was entitled to tribal sovereign immunity; (2) as a matter of first impression, FLSA did not abrogate tribal sovereign immunity; and (3) CEO was entitled to tribal sovereign immunity. Motion granted.

33. ***Dolgencorp Inc. v. Mississippi Band of Choctaw Indians***, No. 4:08CV22, 2011 WL 7110624, 814 F.Supp.2d 952 (2011), *remanded* to 12-60183 (5th Cir. 2011). Plaintiff Dolgen operates a Dollar General store on trust land on the Choctaw Indian Reservation in Choctaw, Mississippi. Dolgen occupies the premises pursuant to a lease agreement with the Mississippi Band of Choctaw Indians (the Tribe) and a business license issued by the Tribe. At all relevant times, Dale Townsend was employed as a store manager. According to defendants, in 2003, defendant John Doe, a minor tribe member, was molested by Townsend during a time when Doe was assigned to work at the Dollar General store as part of the Tribe's Youth Opportunity Program (TYOP), a work experience program run by the Tribe pursuant to which tribal youth were placed with local businesses to gain work experience. Doe and his parents filed suit in Choctaw Tribal court against Townsend, and against Dolgen, seeking actual and punitive damages. In that action, they sought to hold Dolgen vicariously liable for Townsend's actions and directly liable for its own alleged negligence in the hiring, training and supervision of Townsend. The court concluded that Dollar General's motion should be denied and the cross-motions of defendants granted.

34. ***Salt River Project Agr. Imp. and Power Dist. v. Lee****,* No. 10–17895, 2012 WL 858877, 672 F.3d 1176 (9th Cir. 2012). Non-Indian employers brought action seeking declaratory judgment that tribal officials lacked authority to regulate employment relations at their plant and injunction staying former employees' claims under tribal law. The district court, 2009 WL 89570, dismissed complaint, and employers appealed. The appellate court, 371 Fed. Appx. 779, reversed and remanded. On remand, the district court, 2010 WL 4977621, dismissed complaint, and employers appealed. The appellate court held that tribe was not necessary party. Reversed and remanded.

E. Environmental Regulations

35. ***Madera Oversight Coalition, Inc. v. County Of Madera****,* No. F059153, 199 Cal. App. 4th 48, 131 Cal. Rptr. 3d 626 (2011). Objectors petitioned for writ of mandamus challenging county's approval of mixed-use development project under California Environmental Quality Act (CEQA), the Planning and Zoning Law, and the California Water Code. The superior court granted petition in part and denied it in part. Objectors, county, and developers appealed. The appellate court held that: (1) EIR's proposed mitigation measure of "verification" that four prehistoric sites were historical resources improperly contradicted EIR's

conclusion that the sites were historical resources; (2) on issue of first impression, preservation of archaeological historical resources in place is not always mandatory when feasible; (3) a lead agency may not adopt projected future events as the baseline for EIR analysis; and (4) EIR unreasonably omitted circumstances affecting likelihood of availability of water. Affirmed in part and reversed in part.

36. ***Pakootas v. State of Washington***, No. CV–04–256, 2011 WL 5975266, 832 F.Supp.2d 1268 (2011). Operator of smelting plant sought contribution for response costs under Comprehensive Environmental Response Compensation and Liability Act (CERCLA) from State of Washington for costs associated with clean up of slag which had contaminated river. Operator moved for summary judgment. The district court held that State was not an "arranger" for disposal or treatment of hazardous substance. Motion denied and judgment entered for State of Washington. Clarified on Denial of Reconsideration by *Pakootas v. Teck Cominco Metals, Ltd.* E.D. Wash., February 3, 2012.

37. ***State of Alaska, Department of Natural Resources v. Nondalton Tribal Council***, No. S–13681, 268 P.3d 293 (2012). Indian tribes brought action against Department of Natural Resources (DNR) seeking declaratory judgment that the Bristol Bay Area land use plan was unlawful. The superior court denied DNR's motion to dismiss. DNR petitioned for interlocutory review. Upon grant of review, the Supreme Court held that: (1) 30-day period for appeals from final agency actions did not apply to Indian tribes' action, and (2) plan was not a "regulation" pursuant to the Administrative Procedure Act (APA). Reversed and remanded.

38. ***Save the Peaks Coalition v. U.S. Forest Service****,* No. 10–17896, 669 F.3d 1025 (9th Cir. 2012). Environmental group and individuals brought action under National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA) challenging United States Forest Service's (USFS) decision to approve snowmaking project at existing ski area in national forest. Ski resort operator intervened. The district court, 2010 WL 4961417, entered summary judgment in favor of USFS and intervenor, and plaintiffs appealed. The appellate court held that: (1) action was not barred by laches; (2) final environmental impact statement (FEIS) adequately considered risks posed by human ingestion of snow made from reclaimed water; and (3) USFS did not violate its duty to ensure scientific integrity of discussion and analysis in FEIS.

39. ***Karuk Tribe of California v. United States Forest Service****,* No. 05–16801, 681 F.3d 1006 (9th Cir. 2012). The Karuk Tribe sued the United States Forest Service, seeking declaratory and injunctive relief from alleged violation of Endangered Species Act (ESA) by approval of four notices of intent (NOIs) to conduct mining activities in threatened Coho salmon critical habitat within national forest without consultation. The district court, 379 F. Supp. 2d 1071, entered judgment for the government. The Tribe appealed. The appellate court, 640 F.3d 979, affirmed. Subsequently, en banc rehearing was granted. The appellate court held that Forest Service's approval of NOIs required prior consultation with federal wildlife agencies. Reversed and remanded.

40. ***Native Village Of Kivalina IRA Council v. U.S. Protection Agency****,* No. 11-70776, 2012 WL 3217444, 687 F.3d 1216 (9th Cir. 2012). Alaska Native villages petitioned for review of an order of the United States Environmental Protection Agency Environmental Appeals Board, which denied their challenges to the re-issuance of a permit authorizing a mine operator to discharge wastewater caused by mine operation. The appellate court held that villages were not entitled to Board review of villages' challenge to EPA's re-issuance of permit. Petition denied.

F. Fisheries, Water, FERC, BOR

41. ***United States v. Washington***, No. C70–9213, Subproceeding No. 89–3–07, 2011 WL 4945211 (W.D. Wash. 2011). The State of Washington filed a request for dispute resolution under section 9 of the Shellfish Implementation Plan (SIP) to resolve a dispute between the State and the Squaxin Island Tribe regarding proposed leases of state land for private aquaculture activity. The State requested dispute resolution, pursuant to § 8.2.4 of the SIP. This section directs the Magistrate Judge to determine whether or not the leased activity authorizes the taking of shellfish subject to Treaty harvest. If the lease does not, then the lease may be issued. If the land to be leased contains shellfish subject to the Treaty harvest, then the Magistrate Judge shall determine the tribal harvest of a Treaty share of such shellfish consistent with the sharing principles within paragraph 6.1.3, or allow the State and Tribe to reconsider the agreement regarding the tribal harvest. The sharing principles of § 6.1.3 of the SIP reflect the case law, which was developed in the *State v. Washington* cases. In particular, this section of the SIP authorizes tribal harvest "from each enhanced natural bed" of "fifty percent of the sustainable shellfish production (yield) from such beds that would exist absent the Grower's and prior Grower's current and historic

enhancement/cultivation activities." The Court concluded that the Treaty right to fish governs this dispute and not the State property law interpretation urged by the Squaxin Island Tribe. This means that the Tribe has no right to fish an artificial bed, and that the Tribe has a right to a "fair share" of an enhanced natural bed.

42. ***State v. Jim***, No. 84716–9, 2012 WL 402051, 173 Wn. 2d 672, 273 P.3d 434 (2012). An enrolled member of the Yakima Indian Nation moved to dismiss a citation for unlawfully retaining an undersized sturgeon. The district court granted the motion. State appealed. The superior court reversed. The appellate court, 156 Wn. App. 39, 230 P.3d 1080, reversed the superior court and reinstated district court's order of dismissal. The Supreme Court accepted discretionary review. The Supreme Court held that in-lieu fishing sites, as set aside by Congress exclusively for members of four Indian tribes including the Yakima Nation to exercise their treaty fishing rights, was an established "reservation" held in trust by United States, such that state did not have criminal jurisdiction over fishing sites with respect to enrolled members' alleged violations of state provisions. The judgment of the Court of Appeals is affirmed.

43. ***Native Village Of Eyak v. Blank***, No. 09–35881, 688 F.3d 619 (9th Cir. 2012) (9th Cir. 2012). Several Alaskan Native villages brought action against the Secretary of Commerce, seeking to enforce claimed nonexclusive aboriginal hunting and fishing rights in certain parts of the Outer Continental Shelf (OCS) of Gulf of Alaska. Following remand, 375 F.3d 1218, with instructions to determine what aboriginal rights, if any, were held by the villages, the district court conducted a bench trial and found that the villages had no non–exclusive right to hunt and fish in the OCS. Villages appealed. The appellate court held that: (1) Villages satisfied continuous use and occupancy requirement for establishing aboriginal rights; and (2) Villages did not have exclusive use of claimed portions of the OCS. Affirmed.

G. Gaming

44. ***Hardy v. IGT, Inc.***, No. 2:10-CV-901-WKW, 2011 WL 3583745 (M.D. Ala. 2011). During the six months preceding the filing of the complaint in this case, Plaintiff Ozetta Hardy and a purported class collectively bet and lost over $5,000,000 playing electronic bingo at three casinos owned by the Poarch Band of Creek Indians (the "Tribe"). The Tribe was not a defendant in this suit; rather, Hardy brought suit against the Defendant manufacturers (collectively "the Manufacturers") that

allegedly constructed, owned, and operated the electronic bingo machines at the Tribe's casinos. Ms. Hardy alleged that electronic bingo, as played within the Tribe's casinos, constitutes illegal gambling under Alabama and federal law, and the Manufacturers have no right to retain the class' illegal gambling losses under Alabama Code § 8–1–150(a). The court found that Hardy's claim should be dismissed because the Tribe is both a necessary and indispensable party; additionally, because of the Tribe's sovereign immunity and the nature of its interests in this case; the court further found that even had Hardy requested leave to amend her complaint, amendment would likely be futile. Therefore, the court did not need to address the Manufacturers' arguments that Ms. Hardy's state law contract claim is preempted by the Indian Gaming Regulatory Act (IGRA) and operation of federal law. The court granted the Rule 12(b)(7) motions to dismiss filed by Defendants.

45. ***Wells Fargo Bank, National Association v. Lake of the Torches***, No. 10-2069, 658 F.3d 684 (7th Cir. 2011). Wells Fargo Bank brought an action against a tribal casino development corporation, alleging breach of a trust indenture. The district court, 677 F. Supp. 2d 1056, entered an order dismissing the action, and the bank appealed. The appellate court held that: (1) as a matter of first impression, the tribal casino development corporation was a citizen of a state for purposes of diversity statute; and (2) trust indenture was void under the Indian Gaming Regulatory Act (IGRA) because it was a management contract that lacked National Indian Gaming Commission (NIGC) approval. Affirmed in part, reversed in part, and remanded.

46. ***City of Duluth v. Fond Du Lac Band of Lake Superior Chippewa***, No. 09-2668, 2011 WL 5854639, 708 F.Supp.2d 890 (2010). The city of Duluth (the "City") sued Fond du Lac Band of Lake Superior Chippewa (the "Band"), alleging breach of contractual obligations created when the City and the Band agreed to establish a casino in downtown Duluth. The City also seeks declaration that the contracts are valid and enforceable, damages, and an injunction ordering the Band to comply with its contractual obligations. Alternatively, the City seeks accelerated damages for the estimated amounts owed to the City for the remainder of the contractual relationship. The Band asserted counterclaims, alleging that the contracts were unenforceable. After the entry of summary judgment, which barred the Band from challenging the agreement's validity, 708 F. Supp. 2d 890, and entry of an order compelling the Band to arbitrate the amount of rent to be paid to the City for extension term, 2011 WL 1832786, the Band moved for relief from judgment. The district court

held that: (1) the parties' agreement was subject to National Indian Gaming Commission's (NIGC) authority; (2) NIGC's notice of violation was a change in law warranting relief from consent decree; (3) the arbitration provision in the joint venture agreement was no longer enforceable; and (4) NIGC's notice of violation did not apply retroactively. Motion granted in part and denied in part.

47. ***Alturas Indian Rancheria v. California Gambling Control Communities****,* No. 11-2070, 2011 WL 6130912 (E.D. Cal. 2011). The Plaintiff in this case is the Del Rosa Faction of the Alturas Valley Indian Tribe. The Del Rosas filed this action seeking to enjoin the California Gambling and Control Commission (CGCC) from releasing funds held in trust for the Alturas Valley Indian Tribe to the IRS pursuant to two tax levies. Pending before the court were two motions to dismiss. According to the plaintiff, "at the beginning of 2010, the CGCC determined that a leadership dispute within the Tribe required the Commission to withhold Revenue Trust Sharing (RSTF) distributions pending resolution of the dispute." Plaintiff became aware that the IRS had contacted the CGCC seeking levies against the Tribe's RSTF funds. At a meeting held on July 28, 2011, the CGCC voted to recognize the levies and to allow the IRS to execute the levies. Plaintiff claimed that the Tribe has no knowledge of what the levies correspond to, and requested time from the CGCC for the Tribe to investigate the matter directly with the IRS. The Plaintiff alleged that the CGCC's conduct constitutes breach of a tribal-state compact, and breach of the covenant of good faith and fair dealing. After a hearing on whether to issue a preliminary injunction, this court granted a motion by CGCC to interplead the funds subject to the IRS levies, and dismissed the preliminary injunction motion as moot. The court dismissed the case and directed the clerk of court to disburse the funds interpleaded to the court.

48. ***Neighbors of Casino San Pablo v. Salazar****,* No. 11–5136, 442 F. Appx. 579, 773 F. Supp. 2d 141 (2011) *aff'd*, 442 F. Appx. 579 (2011). (From the Order) ORDERED and ADJUDGED that the decision of the district court be affirmed. Counts One and Two, which challenges the National Indian Gaming Commission's (NIGC's) approval of the 2003 and 2008 ordinances, fail for lack of standing because, even if those approvals are invalid, gaming may continue under the 1999 ordinance, which plaintiffs do not challenge. To the extent it presents a constitutional challenge to section 819 of the Omnibus Indian Advancement Act of 2000, Pub. L. No. 106–568, § 819, 114 Stat. 2868, 2919, the claim is time-barred. The claim first accrued on December 27, 2000, when Congress passed section 819, but plaintiffs failed to file their suit until December 18,

2009, almost nine years later. *See* 28 U.S.C. § 2401(a) (barring actions against the United States filed more than "six years after the right of action first accrues").

49. ***Saginaw Chippewa Indian Tribe of Michigan v. The National Labor Relations Board****,* No. 11–14652, 2011 WL 675410, 838 F.Supp.2d 598 (2011). The Saginaw Chippewa Indian Tribe of Michigan filed suit to enjoin the National Labor Relations Board (NLRB) from applying the National Labor Relations Act to the Tribe's casino operations. The Tribe moved for preliminary injunction and the NLRB moved to dismiss the complaint. The district court held that tribe was required to exhaust all administrative remedies prior to bringing a challenge in federal courts. The Tribe's motion was denied and the NLRB's motion was granted.

50. ***Redding Rancheria v. Salazar***, No. 11–1493 SC, 2012 WL 525484, 811 F.Supp.2d 1104 (2012). (From the Opinion) This case is about an Indian tribe's efforts to build a new casino. Plaintiff Redding Rancheria (the "Tribe") currently operates the Win–River Casino on its eight-and-a-half acre reservation in Shasta County. The Tribe seeks to expand its gaming operations by building a second casino on 230 acres of undeveloped riverfront lands (the "Parcels"). In 2010, the Tribe asked the Department of the Interior (DOI) to determine whether the Parcels would be eligible for gaming if the DOI were to take them into trust. The DOI, acting through its Assistant Secretary for Indian Affairs, Defendant Larry Echo Hawk, informed the Tribe that they were not. To make this decision, the DOI relied on regulations promulgated by the Secretary of the Interior, Defendant Kenneth Salazar. In this lawsuit, the Tribe challenges both the decision itself and the regulations on which they were based. The Tribe has moved for summary judgment and the DOI has filed a cross-motion. The court found that the DOI's determination that the Parcels do not qualify for the Restored Lands Exception and therefore are ineligible for gaming remains undisturbed. The Court granted the cross-motion for summary judgment brought by the Defendants, the DOI.

51. ***State of New York v. Shinnecock Indian Nation****,* Docket Nos. 08–1194, 08–1195, 2012 WL 2369192, 686 F.3d 133 (2nd Cir. 2012). New York State, state agencies, and the municipality brought action against an Indian nation and its tribal officials in state court seeking to enjoin them from constructing a casino and conducting certain gaming on a parcel of non-reservation property. The Tribe removed the case to federal court on the basis that the State's complaint had pleaded issues of

federal law. The District Court, 274 F.Supp.2d 268, denied the State's motion to remand, entered preliminary injunction barring construction, 280 F. Supp. 2d 1, and denied parties' cross-motions for summary judgment, 400 F.Supp.2d 486. After reassignment, 523 F.Supp.2d 185, the court entered judgment for the plaintiffs and issued an injunction following a bench trial, and then a limited injunction to construction and operation of a casino or gaming on the property, 560 F.Supp.2d 186. The Tribe appealed. The appellate court held that: (1) the complaint did not raise an issue of federal law by referencing federal law in anticipation of tribe's defenses; and (2) a substantial federal question exception to a well-pleaded complaint rule did not apply. Vacated and remanded.

52. ***State of Oklahoma v. Tiger Hobia, as Town King and Member Kialegee Tribal Town Business Committee***, No. 12-052, 2012 WL 3096634 (N.D. Okla. 2012). Defendants asked the court to reconsider its Order concerning Kialegee Tribal Town jurisdiction over the site. The State of Oklahoma opposed the motion. The State of Oklahoma ("State") filed suit seeking declaratory, preliminary, and permanent injunctive relief to prevent Tiger Hobia, Town King of the Kialegee Tribe (as well as other tribal officers), Florence Development Partners, LLC ("Florence") and the Kialegee Tribal Town, a federally chartered corporation (the "Town Corporation") from proceeding with the construction and operation of the proposed "Red Clay Casino" in Broken Arrow, Oklahoma. The State alleged defendants' actions violated both the April 12, 2011, Gaming Compact between the Kialegee Tribal Town and the State ("State Gaming Compact") and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 ("IGRA"). The court issued a ruling granting plaintiff's Motion for Preliminary Injunction. The court concluded that defendants' actions violated IGRA and the State Gaming Compact because the Broken Arrow Property was not the Kialegee Tribal Town's "Indian lands" as defined by IGRA, and that the Tribal Town did not exercise government power over the property within the meaning of IGRA. The court concluded that defendants' "efforts to construct and operate a gaming facility on the Broken Arrow Property violated [the Indian Gaming Regulatory Act] and—as to Class III gaming—the Kialegee–State Gaming Compact." In their Motion to Reconsider, the defendants advised the court that on May 23, 2012, the owners of the restricted allotment, Marcella Giles and Wynema Capps, applied for enrollment as members of the Kialegee Tribal Town and on May 26, 2012, the Business Committee of the Kialegee Tribal Town voted unanimously to enroll Giles and Capps as members. Defendants asserted, once again, that they share jurisdiction of the

Broken Arrow Property with the Muscogee (Creek) Nation. They also contended the recent enrollment of Giles and Capps as members of the Kialegee Tribal Town—viewed in light of the history of the Muskogee Creek Nation and the Kialegee Tribal Town—"provides the Kialegee Tribal town with a direct interest in the [Broken Arrow Property] and constitutes a change in circumstances that warrants reconsideration." The court denied defendants' Motion to Reconsider the Preliminary Injunction in light of subsequent changed circumstances.

53. ***State of Michigan and Little Traverse Bay Bands of Odawa Indians v. Bay Mills Indian Community***, No. 11–1413, 2012 WL 3326596, 695 F.3d 406 (6th Cir. 2012). The State of Michigan and the Little Traverse Bay Bands of Odawa Indians ("Little Traverse") filed action to prevent the Bay Mills Indian Community ("Bay Mills") from operating a small casino on its property in Vanderbilt, Michigan. The district court entered preliminary injunction ordering Bay Mills to stop gaming at the Vanderbilt casino. The defendant appealed. The appellate court held that: (1) the proximity of the two properties, along with the likelihood that at least some gaming revenue from the defendant's casino otherwise would have gone to Little Traverse through its casino, was enough to show injury in fact; (2) federal courts lacked jurisdiction to adjudicate the claim under the Indian Gaming Regulatory Act (IGRA), alleging that defendant Indian tribe's casino violated the Tribal-State compact, to the extent that the claim had been based on an allegation that the defendant's casino was not on Indian lands; (3) federal courts lacked jurisdiction to adjudicate the claim under the IGRA, alleging that defendant Indian tribe's casino violated Tribal-State compact, to the extent that claim was based on an allegation that the defendant's property had not been acquired by the Secretary of Interior in trust for the benefit of the defendant; (4) common law claims brought by the State of Michigan against Bay Mills to prevent it from operating a small casino, which depended on whether the casino was located on Indian lands, arose under federal law, as required for federal question subject matter jurisdiction; (5) the defendant was immune from a suit on common law claims brought by the State of Michigan to prevent Bay Mills from operating a small casino, which depended on whether the casino was located on Indian lands, unless Congress had authorized the suit or the tribe waived its immunity; (6) a provision of the IGRA that supplied federal jurisdiction and abrogated tribal immunity, did not abrogate Bay Mill's sovereign immunity over claims that did not satisfy all textual prerequisites of the Act; (7) inferential logic that the federal statute governing gambling in Indian Country abrogated sovereign

immunity of Indian tribes with regard to gaming not conducted under the approved Tribal-State gaming compact was not sufficient to abrogate Bay Mill's sovereign immunity with regard to such gaming; and (8) the tribal gaming ordinance waiving immunity only for the tribal commission did not result in waiver of Bay Mill's immunity. Vacated and remanded.

H. Land Claims

54. ***In re Michael Keith Schugg v. Gila River Indian Community***, No. CV 05-2045,, BK Nos. 2–04–13226, 2–04–19091, Adv. No. 2–05–00384, 2012 WL 1906527 (D. Ariz. 2012). Before the Court were the Gila River Indian Community's (GRIC) Motion for Entry of Final Judgment and the Trustee's[1] Motion to Set Rule 16 Hearing and Postpone Entry of Judgment. On or about September 2003, Michael Schugg and Debra Schugg (the "Schuggs") acquired title to Section 16. Section 16 is located wholly within the Reservation and is physically accessible by Smith-Enke Road and Murphy Road. In 2004, the Schuggs declared bankruptcy and listed Section 16 as their largest asset. During the bankruptcy proceedings, the GRIC filed a proof of claim asserting that it had an exclusive right to use and occupy Section 16, it had authority to impose zoning and water use restrictions on Section 16, and a right to injunctive and other relief for trespass on reservation land and lands to which it held aboriginal title. The Trustee then initiated an adversary proceeding seeking a declaratory judgment that the Schuggs' estate had legal title and access to Section 16. At the conclusion of the trial, the Court determined that Plaintiffs, the Shuggs, were entitled to legal access to Section 16 due to an implied easement over Smith-Enke Road and a right of access over Murphy Road, either because of an implied easement or because the relevant portion of the road was an Indian Reservation Road that must remain open for public use, that Defendant is not entitled to exercise zoning authority over Section 16, and that no trespass occurred. The Court of Appeals affirmed in part, but remanded for further consideration of whether Murphy Road was a public road in light of ongoing proceedings before the Bureau of Indian Affairs (BIA) regarding the issue of whether Murphy Road was an Indian Reservation Road open to the public. After remand, the Trustee withdrew his appeal to the BIA regarding the status of Murphy Road as a public road. The Court then directed the Parties to jointly submit a proposed form of judgment that "will close this case." When the Parties represented to the Court that they were

[1] G. Grant Lyon filed this case, acting in his capacity as Chapter 11 Trustee of the bankruptcy estate of Michael Keith Schugg and Debra Schugg (the "Trustee").

unable to agree on a proposed form of judgment, the Court ordered that each party should separately file a proposed form of judgment or "motions as to why judgment should not be entered at this time." It was ordered that the Gila River Indian Community's Motion for Entry of Final Judgment and Memorandum in Support (Doc. 321) was denied. It was further ordered that the Trustee's Motion to Set Rule 16 Hearing and Postpone Entry of Judgment was granted.

55. ***Yowell v. Abbey***, No. 3:11–cv–518, 2012 WL 3205864 (2012). Before the Court was Plaintiff's Motion for Personal Injunctive Relief and Federal Defendants' Motion for Reconsideration of Order Denying Federal Defendants' Motion to Dismiss Complaint. On July 20, 2011, pro se Plaintiff Raymond D. Yowell filed a civil rights complaint pursuant to 42 U.S.C. § 1983, 25 U.S.C. § 478, and *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L. Ed .2d 619 (1971), in Nevada District Court. In the complaint, the Plaintiff sued Robert Abbey, Helen Hankins, Department of the Treasury Financial Management Services ("Treasury-FMS"), Allied Interstate Inc., Pioneer Credit Recovery, Inc., The CBE Group, Inc., Cook Utah of Duchesne, Jim Pitts, Jim Connelley, Dennis Journigan, and Mark Torvinen (collectively the "Defendants"). The complaint alleged the following: Plaintiff was a Shoshone Indian, ward of the United States, and a member of the Te-Moak Tribe of the Western Shoshone Indians of Nevada He was a cattle rancher. Throughout his life, Plaintiff let his livestock graze on the "historic grazing lands associated with the South Fork Indian Reservation." During the 1980s, the Bureau of Land Management (BLM) attempted to get an Indian grazing association to sign a permit to graze livestock, but never approached the Plaintiff directly. The Plaintiff never obtained a permit to graze his livestock because the proclamation that established the South Fork Indian Reservation, pursuant to the Indian Reorganization Act, stated that the reservation came "together with all range, and ranges, and range watering rights of every name, nature, kind and description used in connection" with the described boundaries of the reservation. On May 24, 2002, the Defendants assembled where the Plaintiff's livestock were grazing, gathered the Plaintiff's livestock, and seized the livestock without a warrant or court order for the seizure. The Defendants never gave Plaintiff notice or an opportunity to dispute the underlying basis of the allegations against him. The Defendants sold Plaintiff's livestock on May 31, 2002. The complaint alleged five causes of action: (1) an unwarranted seizure of property in violation of the Fourth Amendment; (2) a due process violation under the

Fifth and Fourteenth Amendments; (3) a violation of Article VI of the U.S. Constitution which provides that treaties made under the authority of the United States are the supreme law of land; (4) violation of his civil rights by breaching the trust of the Indian Reorganization Act of 1934; and (5) violation of his Fifth and Fourteenth Amendment due process rights by seizing his livestock without a warrant or court order, selling his livestock below market prices, and then attempting to collect a deficiency based on the alleged debt. In June 2012, the Court issued an order denying all of the pending motions to dismiss and motions for summary judgment. With respect to the Federal Defendants, the Court found that the statute of limitations was tolled with respect to all five causes of action. The court granted in part and denied in part Plaintiff's Motion for Personal Injunctive Relief.

56. ***David Laughing Horse Robinson v. Salazar***, No. 09–cv–01977, 2012 WL 3245504, 855 F.Supp.2d 1002 (2012). Three motions to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6) were pending before the Eastern District Court of California: (1) motion by Tejon Mountain Village, LLC and Tejon Ranchcorp; (2) motion by County of Kern; and (3) motion by defendant Ken Salazar, in his capacity as the Secretary, U.S. Department of the Interior. The Plaintiffs sought title to occupy and use land they contend the United States guaranteed them pursuant to the 1849 Treaty with the State of Utah and by the establishment of the Tejon Indian Reservation in 1853. Plaintiff, the Kawaiisu Tribe of the Tejon (the "Tribe"), is an Indian tribe which "resided in the State of California since time immemorial." The Tribe acknowledged that it is not on the list of federally recognized tribes by the Bureau of Indian Affairs, but alleged that it is "a federally recognized tribe by virtue of, inter alia, descending from signatories of the 1849 Treaty with the Utahs and the Utah Tribes of Indians." Plaintiffs allege the following claims for relief: (1) Unlawful possession under common law, violation of Non-Intercourse Act, trespass and accounting, against Tejon Defendants; (2) Equitable Enforcement of Treaty against the County of Kern ("Kern"); (3) Violation of the Native American Graves Protection and Repatriation Act, against Tejon Defendants; (4) Deprivation of Property in violation of the Fifth Amendment against Salazar; (5) Breach of Fiduciary Duty against Salazar; (6) Denial of Equal Protection in violation of the Fifth Amendment against Salazar; and (7) Non–Statutory Review against Salazar. The Court ruled as follows: (1) the motions by Defendants Tejon Mountain Village, LLC and Tejon Ranchcorp, County of Kern and Ken Salazar to dismiss the third amended complaint for lack of subject matter jurisdiction

are granted without leave to amend and with prejudice; and (2) the motions by Defendants Tejon Mountain Village, LLC and Tejon Ranchcorp, County of Kern and Ken Salazar to dismiss the third amended complaint for failure to state a claim are granted without leave to amend and with prejudice.

I. Religious Freedom

57. ***State v. Taylor***, No. SCWC 28904, 2011 WL 6376646, 126 Haw. 205 P.3d 740 (2011). Defendant pled guilty in the district court to conspiracy to traffic in Native American cultural items, as prohibited by the Native American Graves Protection and Repatriation Act. Defendant was subsequently indicted by a Hawai'i grand jury for theft in the first degree in connection with same items. The Circuit Court denied the defendant's motion to dismiss, and the defendant appealed. The Intermediate Appellate Court (ICA), 2011 WL 661793, affirmed. The Supreme Court granted certiorari. The Supreme Court held that: (1) evidence on "property of another" element was sufficient to maintain grand jury indictment; and (2) prior federal conviction for conspiracy to traffic in Native American cultural items did not bar, under statutory double-jeopardy provision, a subsequent state prosecution for theft in the first degree involving the same artifacts. The Judgment of ICA is affirmed.

58. ***Oklevueha Native American Church of Hawaii, Inc. v. Holder***, (No. 10–17687, 2012 WL 1150259, 676 F.3d 829 (9th Cir.2012). The Native American Oklevueha church and its spiritual leader, Michael Rex, brought action against government officials, alleging that their right to use marijuana during their religious ceremonies was being infringed on by federal drug laws, and asserted claims under state law for theft and conversion. The district court, 719 F. Supp. 2d 1217 and 2010 WL 4386737, dismissed the action. Plaintiffs appealed. The appellate court held that: (1) the plaintiffs sufficiently alleged a concrete plan; (2) a definite and concrete dispute regarding the lawfulness of marijuana seizure came into existence; (3) the tribal members did not have to demonstrate a threat of future prosecution; (4) the preenforcement claim was ripe for review; (5) the allegations about use, possession, cultivation, and distribution of marijuana were not required; (6) the Religious Freedom Restoration Act (RFRA) did not contain an exhaustion requirement; (7) the Oklevueha Church had associational standing; and (8) the RFRA did not waive sovereign immunity for monetary damages. Affirmed in part, reversed in part, and remanded.

59. ***State v. White****,* No. 36765, 2011 WL 6183613, 152 Idaho 361, 271 P.3d 1217 (2011), *review denied* (2012). The Defendant who was charged with possession of marijuana and paraphernalia moved to dismiss the charges. The Magistrate denied the motion. The Defendant appealed. The District Court affirmed. The Defendant appealed. The appellate court held that substantial evidence supported the Magistrate's determination that the Defendant's use of marijuana was not substantially motivated by a religious belief. Affirmed.

J. Sovereign Immunity and Federal Jurisdiction

60. ***In re Platinum Oil Properties, L.L.C.***, No. 11–09–10832, 465 B.R. 621 (2011). Chapter 11 debtor, Platinum Oil Properties, LLC (the "Debtor"), which claimed ownership of operating rights and working interests in and under two oil and gas leases on Jicarilla Apache Nation (the "Nation") land, moved for orders authorizing its assumption of leases and authorizing secured and super-priority financing. The Nation, which objected to Debtor's motions, moved to dismiss the case and, along with others, objected to a disclosure statement filed with the proposed plan by the Debtor. Parties cross-moved for summary judgment on the issue of ownership of operating rights and working interests. The Bankruptcy Court held that: (1) the Department of the Interior (DOI) and the Nation were bound by terms of confirmed Chapter 11 plan in prior bankruptcy case of Debtor's purported predecessor-in-interest; (2) Bankruptcy Code abrogates tribal sovereign immunity; (3) the sale agreement did not operate to divest the Debtor and its purported transferor of their interests in operating rights and working interests; (4) parol evidence was not admissible to establish the parties' intent that operating rights and working interests were to be transferred to the Debtor under the plan, settlement agreement, and confirmation order in the purported predecessor's case; (5) the record was insufficient to determine what approvals were required for transfer of operating rights to Debtor; and (6) DOI did not approve the transfer of operating rights and working interests to Debtor. Motions denied. Reconsideration denied, 2011 WL 6293132.

61. ***Stillaguamish Tribe of Indians v. Pilchuck Group II L.L.C.****,* No. C10-995, 2011 WL 4001088 (W.D. Wash. 2011). (From the Opinion) "This matter comes before the court on a motion for summary judgment from Plaintiff, the Stillaguamish Tribe of Indians (the "Tribe") and a barely distinguishable motion from Defendant Pilchuck Group II, L.L.C. ("Pilchuck"). Pilchuck also filed a motion to seal documents . . . for the reasons stated below, the court grants the Tribe's motion because, as a

matter of law, the Tribe did not waive its sovereign immunity from suits arising out of the contract at the core of this case. The court accordingly enjoins Pilchuck from pursuing its arbitration demand against the Tribe.

62. Young v. Duenas, No. 66969-9, 2011 WL 4732085, 164 Wn. App. 343, 262 P.3d 527 (2011) *review denied,* 173 Wn.2d 1020, 272 P.3d 851 (2012). Decedent's brother ("Brother") brought an action against individual officers on an Indian tribe's police force, alleging tort and § 1983 claims arising from decedent's death while being arrested by officers. The superior court granted defendants' motion to dismiss for lack of subject matter jurisdiction. The Brother appealed. The appellate court held that: (1) tribal sovereign immunity barred tort claims; and (2) officers were not state actors, as required to state a § 1983 claim. Affirmed.

63. *Vann v. Salazar*, No. 03-1711, 883 F. Supp. 2d 44 (2011) *rev'd and remanded sub nom., Vann v. U.S. Dept. of Interior,* 70 F.3d 927 (2012). Plaintiffs are direct descendants of former slaves of the Cherokees, or free Blacks who intermarried with Cherokees, who were made citizens of the Cherokee Nation in the nineteenth century and are known as Cherokee Freedmen ("Freedmen"). The Freedmen contend that the Principal Chief of the Cherokee Nation, with the approval of the Secretary, has disenfranchised the Freedmen in violation of the Thirteenth Amendment of the United States Constitution and the Treaty of 1866, and that the Federal Defendants have also violated those laws and others by failing to protect the Freedmen's citizenship and voting rights. Before the Court were the motions to dismiss the Federal Defendants' and Principal Chief Crittenden's motions. The Court concluded that the suit cannot proceed without the Cherokee Nation and that the Cherokee Nation did not waive its sovereign immunity such that it can be joined as a party to the suit. The Court granted Crittenden's motion to dismiss, denied the Freedmen's motion for leave to file a fifth amended complaint, and denied as moot the Federal Defendant's motion to dismiss and the Freedmen's motion to consolidate with *Cherokee Nation v. Nash*.

64. *Lewis v. Tulalip Housing Ltd. Partnership No. 3*, No. C11–1596, 2011 WL 6140881 (W.D. Wash. 2011). This matter was before the Snohomish Superior Court on the Plaintiff's Motion to Remand to State Court and for an Award of Fees and Costs. The Plaintiff brought this action in Snohomish County Superior Court naming defendants Mike Alva, Patti Gobin, Chuck James, and Jane Doe James ("Individual Defendants"), Raymond James Native American Housing Opportunities Fund II, L.L.C. (the "Fund"), and Tulalip Housing Limited Partnership # 3

("Partnership"). The Plaintiff is a citizen of the state of Washington. The Individual Defendants are enrolled members of the Tulalip Tribes, who live on the Tulalip Reservation, and are also Washington residents. The Partnership is a Washington limited partnership with its principal place of business in Washington. The Fund is a Delaware limited liability corporation with its principal place of business in Florida. On August 31, 2011, the state court granted a motion to dismiss for lack of subject matter jurisdiction filed on behalf of the Individual Defendants and the Partnership. The non-diverse defendants claimed that the tribal court had exclusive jurisdiction over Plaintiff's claims. Second, the non-diverse defendants argued that Individual Defendants had sovereign immunity as Plaintiff's claims arose out of the performance of their official duties and, in any event, the state had not assumed jurisdiction over claims against tribal members occurring on tribal lands. Finally, the defendants contended that the Tulalip Tribes were an indispensable party that could not be joined because of sovereign immunity. The state court granted the motion without indicating the grounds upon which the dismissal was based. The Fund removed the action to the Federal District Court. The court granted Plaintiff's Motion to Remand, dismissed the case, and remanded to state court.

65. ***McCrary v. Ivanof Bay Village***, No. S-13972, 2011 WL 6116492, 265 P.3d 337 (Alaska 2011) *cert. denied,* 132 S. Ct. 1977 (2012). Developer brought action against the Indian tribe alleging breaches of the implied covenant of good faith and fair dealing arising out of development contracts. The Superior Court dismissed the suit based on sovereign immunity. Developer appealed. The Supreme Court held that tribe was a federally recognized tribe entitled to sovereign immunity. Affirmed.

66. ***Conley v. Comstock Oil & Gas, LP***, No. 09 10 00522 CV, 2011 WL 6225253, 356 S.W.3d 755 (2011). The purported owners of mineral interests, Margaret Brush Conley and the other plaintiffs (collectively "Conley") brought a trespass claim to try title action against a well operator and the landlords who granted leases to the well operator, including the Indian Tribe, to determine possession of the mineral rights. The district court denied the Indian Tribe's plea to the jurisdiction, and granted the well operator's motion for summary judgment. Conley and the Indian Tribe appealed. The appellate court held that: (1) Indian Tribe was immune from purported owners' trespass to try title action; (2) doctrine of stare decisis did not establish as a matter of law location of land that was surveyed in an ancient survey; (3) the doctrine of res judicata did not bar

the purported owners' trespass to title claims; but (4) landowners and the well operator established their title to mineral interests by a presumed grant under the doctrine of presumed lost deed; and (5) the well operator and its predecessor had established peaceable possession of mineral interests for purposes of ten-year adverse possession statute of limitations. Affirmed in part, and reversed and rendered in part.

67. ***Everglades Ecolodge at Big Cypress, LLC v. Seminole Tribe of Florida***, No. 11-60839, 2011 WL 6754024, 836 F. Supp. 2d 1296 (2011). Developer brought an action against the Seminole Tribe (the "Tribe") in state court, alleging breach of lease for the development of a resort and for specific performance. The Tribe removed action to federal court and moved to dismiss. The Developer moved to remand. The district court held that: (1) the Developer's claims arose under federal law; (2) the state court's jurisdiction was preempted; and (3) the waiver of sovereign immunity in the lease was invalid. The Tribe's Motion to Dismiss was granted; Plaintiffs' motion denied.

68. ***Miccosukee Tribe of Indians of Florida v. Department of Environmental****,* No. 2D11–2797, 2011 WL 6934533, 78 So. 3d 31 (2011), The Miccosukee Tribe of Indians (the "Tribe") moved for summary judgment in an eminent domain proceeding brought by the Department of Environmental Protection. The Circuit Court denied the motion. The Tribe petitioned for a writ of certiorari. The appellate court held that: (1) the Indian tribe's sovereign immunity was not implicated in an eminent domain action; and (2) the Nonintercourse Act did not preclude the eminent domain proceeding. Petition denied.

69. ***Three Stars Production Co., LLC v. BP America Production Co.****,* No. 1101162, 2012 WL 32916 (2012). Before the Court was the motion of Defendant BP America Production Company ("BP") pursuant to Fed. R. Civ. P 12(b)(7) and Fed. R. Civ. P. 19. This case involves a dispute over proceeds derived from an oil and gas well, designated as the Southern Ute 53–1 Well ("Well"), located within the exterior boundaries of the Southern Ute Indian Tribe Reservation in La Plata County, Colorado. The land is owned by the United States in trust for the Southern Ute Indian Tribe (the "Tribe"). Plaintiff Three Stars alleged that the Well lies within an established 320-acre drilling and spacing unit, yet Defendant BP has wrongfully distributed the proceeds from the Well on a 240-acre basis. Three Stars has recently acquired the leasehold interest in the 80 acres allegedly within the drilling unit but not included in Defendant's 240-acre distribution area. BP argued that the Department of

the Interior (DOI), the Tribe, and the other owners of interest in the Well are indispensable parties in this action, and therefore must be joined or the action dismissed pursuant to Fed. R. Civ. P. 19. Further, BP contended that the Southern Ute Indian Tribal Court ("Tribal Court") has already determined that the DOI is an indispensable party in this dispute, and thus the doctrine of issue preclusion, also known as collateral estoppel or res judicata, prohibits the Plaintiff from re-litigating the issue in this case. The court found that that the Tribe and the DOI are indispensable parties pursuant to Rule 19 and granted the Motion of Defendant BP America Production Company pursuant to Fed. R. Civ. P. 12(b)(7) and Fed. R. Civ. P. 19. Plaintiff, Three Stars Production Company, LLC must join the DOI and the Tribe as parties to this action through the filing of an amended complaint, or if they cannot be joined, dismiss the action.

70. ***J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Board****,* No. 11-4008, 2012 WL 113866, 842 F.Supp.2d 1163, (2012). A consultant, J.L. Ward Associates ("J.L."), that prepared an application for an Access to Recovery (ATR) grant on behalf of Great Plains Tribal Chairmen's Health Board ("Great Plains"), a non-profit corporation created by sixteen Indian tribes,[2] brought an action alleging breach of contract, promissory estoppel, negligent misrepresentation, fraudulent misrepresentation, unjust enrichment, and infringement on its copyrights. J.L. moved to dismiss the complaint. The district court held that: (1) the Great Plains was a tribal entity entitled to sovereign immunity; (2) the dispute resolution clause in parties' contract did not waive entity's sovereign immunity to allow federal court to address the merits of the claims; and (3) the Great Plains was a citizen of South Dakota, for diversity purposes. Motion granted in part.

71. ***United States v. Juvenile Male****,* No. 11–30065, 2012 WL 164105, 666 F.3d 1212 (9th Cir. 2012). A juvenile male appealed the district court's determination that he is an "Indian" under 18 U.S.C. § 1153, which provides federal criminal jurisdiction for certain crimes committed by Indians in Indian Country. The juvenile claims that he does not identify as an Indian, and is not socially recognized as an Indian by other tribal

[2] The Great Plains was incorporated in 1992 as a non-profit corporation. Sixteen federally recognized Indian tribes from South Dakota, North Dakota, Nebraska, and Iowa formed the Great Plains in order to provide the Indian people of the Great Plains area with a single entity to communicate and participate with the Indian Health Service and other federal agencies on health matters.

members. Nonetheless, he is an enrolled tribal member, has received tribal assistance, and has used his membership to obtain tribal benefits. The court held that because the juvenile is Indian by blood and easily meets three of the most important factors used to evaluate tribal recognition laid out in *United States v. Bruce,* 394 F.3d 1215 (9th Cir.2005), he is an "Indian" under § 1153, therefore his conviction is upheld.

72. ***United States v. Juvenile Male****,* Nos. 09-30330, 09-30273, 2012 WL 206263, 670 F.3d 999 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 234 (2012). Three juvenile defendants, each of whom was a member of an Indian tribe and who pleaded true to a charge of aggravated sexual abuse with children in the district court appealed their conditions of probation or supervision requiring registration under the Sex Offender Registration and Notification Act (SORNA). The appellate court held that: (1) the SORNA registration requirement as applied to certain juvenile delinquents in cases of aggravated sexual abuse superseded conflicting confidentiality provisions of Federal Juvenile Delinquency Act (FJDA); and (2) the SORNA registration requirement did not violate juveniles' constitutional rights. Affirmed.

73. ***Koscielak v. Stockbridge-Munsee Community****,* No. 2011AP364, 2012 WL 447275, 340 Wis. 2d 409, 811 N.W.2d 451 *review granted,* 342 Wis. 2d 155, 816 N.W.2d 321 (2012). Robert and Mary Koscielak appealed a judgment dismissing their tort claims against the Stockbridge-Munsee Community ("he "Tribe"), doing business as Pine Hills Golf Course and Supper Club ("Pine Hills"), and its insurer, First Americans Insurance Group, Inc. Robert Koscielak slipped and fell on ice in the Pine Hills parking lot, and sustained serious injuries requiring hospitalization. He and his wife filed suit against the Tribe under its business name, Pine Hills alleging a variety of tort claims. Pine Hills filed a motion to dismiss that contained exhibits outside the pleadings. Accordingly, the motion was converted to one for summary judgment, which the circuit court granted. The court concluded Pine Hills was a subordinate economic entity of the Tribe such that Pine Hills was entitled to the sovereign immunity conferred upon the Tribe by federal law. Because the Koscielaks' claims against the Tribe were barred, the court determined their claims against First Americans were barred, too. Accordingly, the court dismissed all claims against the Tribe and First Americans. The circuit court concluded tribal immunity barred the Koscielaks' claims and the appellate court agreed and affirmed.

74. ***Wiseman v. Osage Indian Agency****,* 11cv1385, 2012 WL 515876 (E.D. Va. 2012). Before the court was Garnishee Osage Indian Agency's Motion to Quash Garnishment Summons and Motion to Dismiss. The Osage Indian Agency (the "Agency") removed a garnishment summons to the district court. Plaintiff-judgment creditor Lynda Wiseman obtained the summons in Fairfax County Circuit Court. Ms. Wiseman served the summons upon the Agency in an attempt to collect a judgment she obtained against Defendant-judgment debtor William Berne in the Fairfax County Circuit Court. The judgment was in the amount of $63,565.55 and resulted from Mr. Berne's mishandling of an estate over which Mr. Berne was the executor. The Osage Nation is a federally recognized Native American tribe, primarily located in Oklahoma. The Osage Agency is a component of the United States Department of the Interior's Bureau of Indian Affairs, and is responsible for providing services to the Osage Nation. Mr. Berne is not a member of the Osage Nation, but he does own an "Osage mineral non-Indian headright," which entitles him to land royalties from the United States. Ms. Wiseman sought to garnish the amounts Mr. Berne is due from his headright. The Agency moved to quash the garnishment summons and dismiss the case, asserting that the district court lacks subject matter jurisdiction to enforce the summons because it is against the United States, which is entitled to immunity. Plaintiff failed to file a response. The Court granted the Osage Indian Agency's Motion to Quash Garnishment Summons and Motion to Dismiss.

75. ***Hollywood Mobile Estates Limited v. Cypress***, No. 11–13482, 2012 WL 975072, 464 F. Appx. 837 (11th Cir. 2012). Various officials of the Seminole Tribe of Florida appealed the district court's grant of a preliminary injunction to Hollywood Mobile Estates, Ltd., contending that the underlying cause of action is only for breach of a lease agreement and thus does not fit within the limited exception to tribal sovereign immunity created by *Ex parte Young,* 209 U.S. 123, 28 S. Ct. 441 (1908). Hollywood Mobile Estates operated a mobile home park on land it leased from the Seminole Tribe. In 2008, the Seminole Tribe ejected Hollywood Mobile Estates from the leased property and began collecting rent from sublessees. Hollywood Mobile Estates filed suit seeking restitution of the lost rent and an injunction compelling the Seminole Tribe to return possession of the land to it. The district court dismissed the suit for lack of jurisdiction, concluding the claims were barred by the Seminole Tribe's sovereign immunity. The appellate court affirmed the dismissal as to the restitution claim. *Hollywood Mobile Estates, Ltd. v. Cypress*, 415 F. App'x 207, 209 (11th Cir. 2011) (unpublished). The district court reversed and

remanded as to the request for injunctive relief, holding that the relief was not barred by the Seminole Tribe's sovereign immunity because it was prospective and did not implicate special sovereignty interests. On remand, Hollywood Mobile Estates moved for a preliminary injunction ordering the Seminole Tribe to restore to it the leased property. The district court granted that motion and issued the requested injunction. The Seminole Tribe appealed from that order. The appellate court found that the Seminole Tribe's attack on the district court's order is merely an effort to relitigate the sovereign immunity question it decided one year ago. It argued that the injunction does not fit within the *Ex parte Young* exception to tribal sovereign immunity because it is issued to remedy an alleged breach of a lease and not a violation of the Constitution or federal law. Affirmed.

76. ***Missouri v. Webb***, No. 4:11CV1237, 2012 WL 1033414 (E.D. Mo. 2012). (From the Opinion) The State of Missouri filed this action in the Circuit Court of St. Louis County, Missouri, alleging claims for piercing of the corporate veil and violation of the Missouri Merchandising Practices Act (MMPA), Mo. Rev. Stat. § 407.010 *et. seq*. against Defendants Martin A. Webb ("Webb"), 24-7 Cash Direct LLC, Financial Solutions LLC, Great Sky Finance LLC, High Country Ventures LLC, Management Systems LLC, Payday Financial LLC, Red River Ventures LLC, Red Stone Financial LLC, Western Capital LLC, Western Sky Financial LLC (collectively "Lending Companies"), certain limited liability companies organized and registered under the laws of South Dakota, engaged in the business of internet-based lending, and owned, controlled, or managed by Webb. Defendants timely removed this action pursuant to 28 U.S.C. §§ 1331 and 1441(a), asserting in their notice of removal that Plaintiff's claims give rise to substantial, disputed questions of federal law, and that they are entitled to tribal immunity as a Native-American owned businesses operating on tribal lands. Before the Court are Plaintiff's motion to remand pursuant to 28 U.S.C. § 1447(c), and Defendants' motion to dismiss. The court granted the Plaintiff's motion to remand and, therefore, did not address the arguments set forth in Defendants' motion to dismiss.

77. ***Alltel Communications, L.L.C. v. DeJordy***, No. 11–1520, 20122 WL 1108822, 675 F.3d 1100 (8th Cir. 2012). The Oglala Sioux Tribe (the "Tribe") and the tribal administrator filed motions to quash third-

party subpoenas *duces tecum*[3] served by the Alltell Communications ("Alltell") that filed suit in another district against former senior vice president for allegedly breaching a separation agreement by assisting the Tribe in tribal court lawsuit to enjoin Alltell from the proposed sale of assets that provided telecommunications services on the Pine Ridge Indian Reservation. The district court denied motions. The Tribe and the tribal administrator appealed. The appellate court held that tribal immunity barred enforcement of subpoenas. Reversed.

78. ***United States v. Diaz***, No. 10–2252, 2012 WL 1592967, 679 F.3d 1183 (10th Cir. 2012). Linda Diaz was convicted of knowingly leaving the scene of a car accident where she hit and killed a pedestrian. The accident occurred on the Pojoaque Pueblo Indian reservation. She was charged with committing a crime in Indian Country under 18 U.S.C. § 1152. On appeal, among other issues, Diaz contended the federal court lacked jurisdiction over the crime because the government failed to prove that the victim was not an Indian, a jurisdictional requirement under § 1152. The appellate court concluded the government met its burden of proof. The testimony of the victim's father provided enough evidence for a jury to conclude the victim was not an Indian for purposes of the statute. The court also concluded the district court did not err in its rulings on various other evidentiary and trial issues. Having jurisdiction pursuant to 18 U.S.C. § 1291, the court affirmed.

79. ***Chavez v. Navajo Nation Tribal Courts****,* No. 11–2203, 465 F. Appx. 813 (10th Cir. 2012). Not selected for publication in the Federal Reporter. (From the opinion.) Russell W. Chavez is a member of the Navajo Nation, a federally recognized Indian Tribe. He filed in federal district court a pro se 42 U.S.C. § 1983 civil rights complaint against the Navajo Nation and various Tribal officials (collectively the "Defendants"). The Defendants moved to dismiss the case for failure to state a claim under Fed. R. Civ. P 12(b)(6). The district court dismissed the case for lack of jurisdiction. The court held that Mr. Chavez's lawsuit against the Defendants could not be maintained in federal court under § 1983 because all of his challenges to the Defendants' actions relied on Tribal law. *See Burrell v. Armijo,* 456 F.3d 1159, 1174 (10th Cir. 2006) ("A § 1983 action is unavailable for persons alleging deprivation of constitutional rights under color of tribal law, as opposed to state law." (internal quotation marks omitted)); *see also Polk Cnty. v. Dodson,* 454

[3] A Suppoena *duces tecum* is a court summons ordering the recipient to appear before the court and produce documents or other tangible evidence for use at a hearing or trial.

U.S. 312, 315, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981) (observing that acting under color of state law is "a jurisdictional requisite for a § 1983 action"). Turning to the Defendants, the court held that Congress had not authorized suit "against tribal entities pursuant to 42 U.S.C. § 1983." *See Nanomantube v. Kickapoo Tribe in Kan.,* 631 F.3d 1150, 1152 (10th Cir. 2011) ("[A]n Indian tribe is not subject to suit in a federal or state court unless the tribe's sovereign immunity has been either abrogated by Congress or waived by the tribe."); *E.F.W. v. St. Stephen's Indian High Sch.,* 264 F.3d 1297, 1302–03 (10th Cir. 2001) (observing that tribal sovereign immunity "is a matter of subject matter jurisdiction"). Mr. Chavez appeals. The court affirmed the judgment of the district court for substantially the same reasons stated by the magistrate judge.

80. ***Shield v. Sinclair***, No. 10-35650, 2012 WL 1893563, 473 F. Appx. 726 (9th Cir. 2012). Not selected for publication in the Federal Reporter. (From the opinion.) The Plaintiffs, who are five members of the Little Shell Tribe of Chippewa Indians, a non-federally recognized Indian tribe, appeal from the district court's judgment dismissing their action alleging that the defendants, violated their rights under 42 U.S.C. § 1985(3) and 25 U.S.C. § 1302. The Court of Appeals for the Ninth Circuit affirmed. The Court of Appeals held the district court properly dismissed the claims plaintiffs brought under section 1985(3) because the first amended complaint failed to allege facts sufficient to show that they are a protected class. *See Schultz v. Sundberg,* 759 F.2d 714, 718 (9th Cir. 1985) (per curiam) (to bring a claim under section 1985(3), plaintiffs must show that "the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection"). The district court properly dismissed the claims plaintiffs brought under the Indian Civil Rights Act because "the only remedy available from the federal courts under [the Act] is a writ of habeas corpus under 25 U.S.C. § 1303." *Hein v. Capitan Grande Band of Diegueno Mission Indians,* 201 F.3d 1256, 1259-60 (9th Cir. 2000). Affirmed.

81. ***Wallulatum v. The Confederated Tribes of the Warm Spings Reservation Of Oregon Public Safety Branch***, 6:08-CV-747-AA, 2012 WL 1952000 (D. Or. 2012). Plaintiff filed this action under 42 U.S.C. § 1983 alleging that the Confederated Tribes of the Warm Springs Reservation of Oregon Public Safety Branch (the "Tribe") violated his rights under the Fourth Amendment of the United States Constitution by using excessive force against him when he was arrested on the Warm

Springs Indian Reservation. The Plaintiff is an enrolled tribal member of the Confederated Tribes of the Warm Springs Reservation of Oregon. The incident giving rise to the plaintiff's claims occurred on the Warm Springs Indian Reservation. It is undisputed that at the time of the incident, that the defendant Patterson's actions were taken as a tribal officer. The law is clear that no action can be brought in federal court for alleged deprivations of constitutional rights under the color of tribal law. *R.J. Williams Co. v. Fort Belnap Housing Authority,* 719 F.2d 979, 982 (9th Cir. 1983); *Desautel v. Dupris,* 2011 WL 5025270 (E.D. Wash. 2011). Thus the actionable conduct, if any, was under the color of tribal law and 42 U.S.C. § 1983 does not provide a proper jurisdictional basis for this court to entertain plaintiff's claim. For these reasons, the District Court of Oregon is without jurisdiction and the Tribe is entitled to dismissal of plaintiff's claims against him.

82. ***Marceau v. Blackfeet Housing Authority***, (No. 11–35444, 2012 WL 1999856, 473 F. Appx. 764 (9th Cir. 2012) *cert. denied,* 133 S. Ct. 931 (2013). In this putative class action, plaintiffs—American Indian individuals whose homes were built in the late 1970s with the financial assistance of the United States Department of Housing and Urban Development ("HUD")—appeal the district court's grant of summary judgment in favor of HUD. The Court of Appeals affirmed. The district court correctly rejected plaintiffs' Administrative Procedure Act (APA) claim that HUD, in violation of its statutory and regulatory authority, required the use of wooden foundations in the construction of the plaintiffs' houses. According to statute, civil actions against federal agencies must be "filed within six years after the right of action first accrues," 28 U.S.C. § 2401(a); a substantive challenge to an agency decision as beyond its authority accrues when the disputed decision is first "appli[ed] ... to the challenger," *Wind River Mining Corp. v. United States,* 946 F.2d 710, 715-16 (9th Cir. 1991). Plaintiffs' claim against HUD accrued in the late 1970s, when the agency purportedly decided to require wooden foundations. At that time, plaintiffs knew about the decision and knew that it affected them. *Cf. id.* at 715 (agency action not immune from review simply because it occurred "long before anyone discovered the true state of affairs"); *N. Cnty. Cmty. Alliance, Inc. v. Salazar,* 573 F.3d 738, 743 (9th Cir. 2009) (allowing challenge to 14-year-old agency action to proceed where plaintiffs could not have known it would affect them until shortly before filing suit). The fact that the plaintiffs may not have immediately grasped the full impact HUD's decision might eventually have on them does not mean they knew too little in 1980 to bring an APA challenge. The district

court also correctly rejected plaintiffs' claim that HUD wrongly denied, or failed to respond to, various requests made by individual homeowners and by their Indian housing authority for HUD's assistance in repairing and maintaining the houses. Plaintiffs identified several instances in which HUD officials were alerted to the problems plaintiffs faced as a result of the wooden foundations used in the construction of their homes, but there were no instances in which HUD failed to comply with a specific obligation imposed by law. Affirmed.

83. ***Harris v. Muscogee (Creek) Nation***, 11-CV-654-GKF-FHM, 2012 WL 2279340 (N.D. Okla. 2012). Before the court were the Motion to Dismiss of defendant Muscogee (Creek) Nation ("Creek Nation") and the Motion to Dismiss of defendant Hudson Insurance Company ("Hudson"). Plaintiff, a customer of River Spirit Casino, was injured in a slip and fall accident at the casino. She filed suit in Tulsa County District Court against Creek Nation, the owner of the casino, asserting a claim for negligence, and against Hudson, the casino's liability insurer. Plaintiff asserted she is a third party beneficiary of the insurance policy and Hudson breached the policy by denying her tort claim. Creek Nation removed the case to federal court pursuant to 28 U.S.C. §§ 1331, 1441 and 1446, alleging federal question jurisdiction. Specifically, Creek Nation asserted the federal question raised by plaintiff's action is whether the state court has jurisdiction over a tort action arising in Indian Country against the Creek Nation. Citing *Williams v. Lee,* 358 U.S. 217, 217-18 (1959), the Creek Nation argued federal law determines whether a state may exercise jurisdiction over civil actions against Indians in Indian Country. Subsequently, the Creek Nation filed a Rule 12(b)(1) Motion to Dismiss, asserting plaintiff's claim against it was barred by tribal sovereign immunity, which deprives the court of subject matter jurisdiction. Hudson also moved to dismiss the breach of contract claim pursuant to Rule 12(b)(6), on the basis that Oklahoma does not recognize a claim by an injured plaintiff against an insurer based on a third party beneficiary theory. The court granted defendant Creek Nation's Motion to Dismiss.

84. ***Furry v. Miccosukee Tribe Of Indians Of Florida***, No. 11-13673, 2012 WL 2478232, 685 F.3d 1224 (11th Cir. 2012) *cert. denied*, 133 S. Ct. 663 (2012). John Furry, as personal representative of the estate of his daughter, brought a wrongful death action against the Miccosukee Tribe (the "Tribe") that owned and operated a gambling and resort facility, asserting that the Tribe violated federal law and Florida's dram shop law by knowingly serving excessive amounts of alcohol to his

daughter, who later was involved in a fatal motor vehicle collision. The Tribe moved to dismiss on the ground that it was immune from suit under the doctrine of tribal sovereign immunity. The district court, 2011 WL 2747666, granted the motion, and plaintiff appealed. The appellate court held that: (1) in enacting the federal statute governing the application of Indian liquor laws, which authorizes state regulation and licensing of tribal liquor transactions, Congress did not abrogate tribal immunity from private tort suits based on state dram shop acts or other tort laws; and (2) the Tribe did not waive its immunity from private tort actions by applying for a state liquor license. Affirmed.

85. ***Harvest Institute Freedman Federation, L.L.C. v. United States****,* No. 11-3113, 2012 WL 2580775, **,** 478 F. Appx. 332 (6th Cir. 2012) *cert. denied,* 133 S. Ct. 673 (2012). Not selected for publication in the Federal Reporter. Plaintiffs-Appellants Harvest Institute Freedman Federation ("Harvest") and Leatrice Tanner-Brown want the federal courts to hold that the Claims Resolution Act, No. 111–291, 124 Stat. 3064 (2010) (the "Act"), is unconstitutional because it perpetuates racial discrimination against former slaves-known as the Freedmen-of certain Native American tribes ("Freedman"). Congress enacted the Act to implement the settlement between the parties in *Cobell v. Salazar*, No. 1:96CV01285–JR (D.D.C.), which was a class-action lawsuit brought by a number of individual Native Americans against the Secretaries of the Departments of the Interior and of the Treasury. The class in *Cobell* claimed that the United States had breached its fiduciary duty to properly administer the Individual Indian Money (IIM) Accounts held on the behalf of certain Native Americans. The Harvest plaintiffs claim that the Freedmen were wrongfully excluded from ownership of the IIM Accounts due to racism, and that it perpetuates racial discrimination for Congress to not address their claims at the same time that it addresses the claims of the *Cobell* class. The district court dismissed the case, holding that the Harvest plaintiffs did not have standing because any injury to them is not fairly traceable to the United States and because the injury will not be redressed by a favorable decision. The Harvest plaintiffs timely appealed. The appellate court concluded that the district court did not err in dismissing the case and affirmed the judgment of the district court.

86. ***In re Greektown Holdings, L.L.C.***, 475 B.R. 563 (2012) *reconsideration denied,* 12-CV-12340, 2012 WL 4484933 (E.D. Mich. 2012). An unsecured creditors committee brought an adversary proceeding against alleged transferees of avoidable fraudulent transfers,

including Sault Ste. Marie Tribe of the Chippewa Indians (the "Tribe") and the Kewadin Gaming Authority (the "Authority"). After replacing the committee as plaintiff, the trustee for both the litigation trust and unsecured creditors distribution trust sought approval of settlement with the Tribe and the Authority. The nonsettling defendants objected. The district court, held that: (1) the Tribe and the Authority were not judicially estopped from seeking claims bar order in settlement, without carve-out for nonsettling defendants; (2) the nonsettling defendants did not have a potential viable claim for indemnification against the Tribe and the Authority; (3) nonsettling defendants were not joint tortfeasors with the Tribe and the Authority, as required for nonsettling defendants to have viable contribution claims; (4) nonsettling defendants did not have a potential viable claim for fraud; (5) nonsettling defendants did not have a potential viable claim for deepening insolvency; (6) the Tribe and the Authority did not waive sovereign immunity from suit with respect to any claims that nonsettling defendants might later assert against them; and (7) the proposed settlement was fair and reasonable, warranting its approval. Motion granted and settlement approved.

87. ***In re Linda Rose Whitaker, Debtor, Paul W. Bucher, Trustee v. Dakota Finance Corporation***, Nos. 12–6004, 12–6005, 12–6006, 12–6007, 2012 WL 2924252, 474 B.R. 687 (8th Cir. 2012). Chapter 7 bankruptcy trustees (the "Trustees") brought four adversary proceedings against The Lower Sioux Indian Community (the "Tribe") and its "subsidiary," Dakota Finance Corporation. In three of the proceedings, the Trustees are pursuing the Tribe and debtors for turnover of ongoing tribal revenue payments owed to the debtors under the Tribe's ordinances and the Indian Gaming Regulatory Act. In one of the proceedings, the Trustee is seeking to avoid a lien asserted by Dakota Finance Corporation or compel turnover. The Bankruptcy Court granted defendants' motion to dismiss on sovereign immunity grounds, on the theory that Congress had not abrogated the immunity that they possessed as an Indian tribe and tribal finance company. The Trustees appealed. The Bankruptcy Appellate Panel held that: (1) Congress did not unequivocally express its intent to abrogate sovereign immunity of Indian tribes in suits under the Bankruptcy Code; and (2) the tribal finance company was sufficiently close to the Tribe to assert its sovereign immunity, and could not be subject of avoidance actions brought by the Chapter 7 Trustees. Affirmed.

88. ***Somerlott v. Cherokee Nation Distributors, Inc***., No. 10–6157, 2012 WL 3055566, 686 F.3d 1144 (10th Cir. 2012). An employee brought a federal employment discrimination claim against CND, LLC, a

limited liability corporation wholly owned and regulated by the Cherokee Nation. The employee alleged violations of Title VII and the Age Discrimination in Employment Act. The district court, 2010 WL 1541574, dismissed the complaint for lack of subject matter jurisdiction. The employee appealed. The appellate court held that: (1) the tribal corporation was not immune from the employee's federal employment discrimination claims under tribal sovereign immunity; and (2) the employee failed to preserve an argument regarding sovereign immunity. Affirmed.

89. ***Cook Inlet Region, Inc. v. Rude***, No. 11-35252, 2012 WL 3553477, 690 F.3d 1127 (9th Cir. 2012). An Alaska Native regional corporation (the "Corporation"), formed under the Alaska Native Claims Settlement Act (ANCSA), brought an action against shareholders and former directors, alleging defendants violated ANCSA and Alaska law by soliciting shareholder signatures for petitions for a vote to lift alienability restrictions on corporation's stock and for a special shareholder meeting to consider certain advisory resolutions. The Corporation moved for summary judgment. The district court, 2010 WL 5146520, granted the motion. The district court subsequently denied defendants' motion for relief from judgment insofar as it sought relief on the ground that the district court lacked federal-question subject matter jurisdiction. The Defendants appealed. The appellate court held that district court had federal-question jurisdiction over ANCSA claims. The fact that the provision of ANCSA governing shareholder petitions incorporated a provision of state law that prohibited false and materially misleading statements in a solicitation of proxies did not change the fact that the case arises under federal law. Affirmed.

K. Sovereignty, Tribal Inherent

90. ***State v. Eriksen***, No. 80653-5, 172 Wash.2d 506, 259 P.3d 1079 (2011). The Defendant, a non-native American, was convicted in the Superior Court of driving under the influence (DUI) in connection with an incident where she was detained by a tribal police officer who pursued her beyond the borders of an Indian reservation after the tribal police officer observed her committing alleged traffic infractions. Defendant moved for discretionary review. On reconsideration, the Supreme Court held that the tribal police officer lacked the inherent authority to stop and detain the Defendant on state land outside Indian reservation. Reversed and remanded.

91. ***DesAutel v. Dupris***, No. CV-11-0301-EFS, 2011 WL 5025270 (E.D. Wash. 2011). The Plaintiffs, Shawn DesAutel, Tamara Davis, and Tonia DesAutel, filed a pro se lawsuit. The essence of Plaintiffs' ninety-two page Complaint is that the Colville Tribal Court and Business Council and individuals connected with those entities (collectively "Defendants") violated the Plaintiffs' U.S. constitutional rights: (1) by granting them adopted tribal membership rather than enrolled tribal membership; (2) by the process used to deny enrolled tribal membership; and (3) by requiring Mr. DesAutel to pay the Colville Business Council's attorney fees and costs incurred as a result of his tribal court lawsuits. Although the Plaintiffs are treated as adopted tribal members, the Plaintiffs sought enrolled tribal membership which would allow the Plaintiffs to receive additional tribal per capita payments. The Plaintiffs asked the Court to set aside the Colville Business Council and Colville Tribal Court's decisions and orders and find that the Plaintiffs are entitled to enrolled tribal membership and receipt of the accompanying per capita payments. The Court denied the Plaintiffs' motions and entered judgment in the Defendants' favor.

92. ***State v. Smith***, No. 07FE0142; A142178, 2011 WL 5866211, 268 P.3d 644, 246 Or. App. 614 (2011). The Defendant was convicted in the Circuit Court of attempting to elude a police officer, failing to perform duties of a driver, driving under the influence of intoxicants, and reckless driving. Defendant appealed the conviction. The Appellate Court held that: (1) the "hot pursuit" provision of the tribal code applied both to tribal police acting outside of their jurisdictional authority and non-tribal police acting outside of their jurisdictional authority; (2) the arresting officer was not required to follow warrant requirements of tribal code in arresting the Defendant; (3) as matter of first impression, a non-tribal police officer may arrest a person for a traffic offense on the Warm Springs reservation under the "hot pursuit" provision of the tribal code; and (4) a city police officer is authorized to stop and arrest a driver on the reservation. Affirmed.

93. ***Carden v. Owle Construction L.L.C.***, No. COA11–298, 2012 WL 120069, 720 S.E.2d 825 (2012). The Plaintiff brought an action against a tribal casino and construction company after he was struck by a passing vehicle while standing at a crosswalk at an intersection where the construction company was carrying out improvements. The Casino and company filed a motion to dismiss, alleging the tribal casino gaming entity was a necessary party, and casino moved in the alternative to "remove" to the tribal court. The Superior Court entered a consent order, stayed the

action, and removed the matter to the Tribal Court. After a jury trial, which resulted in a mistrial and settlement of Plaintiff's claims against the casino and gaming entity, the Plaintiff filed a notice of dismissal in the Tribal Court and thereafter filed a motion to lift the stay. The Superior Court denied the motion, and the Plaintiff appealed. The Appellate Court held that the action was removed, and thus the Superior Court could not lift the stay. Affirmed.

94. ***Bradley v. Bear***, No. 104,080, 2012 WL 167337, 46 Kan.App.2d 1008, 272 P.3d 611 (2012). Nancy Sue Bear claimed the Brown County District Court did not have jurisdiction to dissolve her family partnership and then partition and order the sale of real estate that she and her family, all enrolled members of the Kickapoo Nation Tribe, farmed on the Kickapoo Reservation. The Appellate Court relied on the rule that Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories. Because all of the parties to their action are enrolled members of the Kickapoo Nation Tribe and all of the land is located within the Kickapoo Reservation, the Appellate Court held that the Tribal Court is the proper forum for resolving this dispute, reversed the judgments of the District Court, and remanded the matter with directions to dismiss the case.

95. ***Grand Canyon Skywalk Development, L.L.C. v. 'SA' NYU WA Inc.***, No. CV12–8030, 2012 WL 1207149 (D. Ariz. 2012). AMENDED ORDER. The Plaintiff asked the Court to declare that the Hualapai Indian Tribe has no authority to condemn the Plaintiff's private contract rights in the Skywalk Agreement and that the Hualapai Indian Tribe's condemnation ordinance is invalid. The Plaintiff argues that it is not required to exhaust its remedies in Hualapai Tribal Court because several exceptions to exhaustion apply. The Court's order of February 28, 2012, found that the Plaintiff had failed to show two of the exceptions applied—it is "plain" that the Tribal Court lacks jurisdiction or exhausting the issue of jurisdiction in the Tribal Court will be futile. The Court found, however, the Plaintiff made a colorable claim that the bad faith exception to the exhaustion requirement applied. The Court ordered the parties to provide additional briefing, and the parties filed supplemental briefs. For the reasons stated below, the Court concluded the bad faith exception to exhaustion did not apply. Therefore, the Court denied the Plaintiff's motion for a TRO, required the Plaintiff to exhaust its jurisdictional arguments in the Tribal Court, and stayed this action. IT IS ORDERED: (1) The Plaintiff Grand Canyon Skywalk Development Company's complaint is stayed in the interest of requiring the Plaintiff to exhaust its

Tribal Court remedies. (2) The Plaintiff's motion for an emergency TRO is denied. (3) The Defendant's motion to strike is denied as moot.

96. ***Fox Drywall & Plastering, Inc. v. Sioux Falls Construction Company****,* No. 12-CIV-4026, 2012 WL 1457183 (D.S.D. 2012). The Defendant, Sioux Falls Construction Company, entered into a contract with the Flandreau Santee Sioux Tribe (the "Tribe") to serve as the general contractor for the construction of an addition to the Royal River Casino and Motel near Flandreau, South Dakota. Sioux Falls Construction entered into individual subcontractor agreements with each of the Plaintiffs, Fox Drywall & Plastering, Inc., S and S Builders, Inc., G & D Viking Glass, Inc., and H & R Roofing of South Dakota, Inc. (collectively "Plaintiffs" or "subcontractors"). After the project was completed, the Tribe brought suit against Sioux Falls Construction in the Flandreau Santee Sioux Tribal Court ("Tribal Court"). Sioux Falls Construction filed a third-party indemnity and contribution action ("third-party complaint") against the Plaintiffs in the Tribal Court. The Plaintiffs filed a motion to dismiss based on the Tribal Court's lack of subject matter jurisdiction. The Tribal Court initially denied the motion to dismiss, and the Plaintiffs appealed. The Flandreau Santee Sioux Tribal Appellate Court (Tribal Appellate Court) remanded the case to the Tribal Court to conduct an evidentiary hearing. After conducting an evidentiary hearing, the Tribal Court denied the motion to dismiss. The Tribal Appellate Court upheld the Tribal Court's determination that it had jurisdiction over the third-party complaint. Plaintiffs filed an action in Federal Court seeking a preliminary injunction to enjoin the Tribal Court's assertion of jurisdiction over Sioux Falls Construction's third-party complaint. Sioux Falls Construction resists. On April 24, 2012, the federal court held a hearing on the preliminary injunction. The Federal Court denied the motion for a preliminary injunction.

97. ***United States v. Gatewood***, No. CR–11–08074, 2012 WL 2389960 (D. Ariz. 2012). Before the Court was the Defendant Jefferson Gatewood's motion to dismiss counts I and II of the superseding indictment ("Motion"). The Defendant was charged in counts I and II with sexually abusing a minor. The Defendant was previously tried in Tribal Court for sexually abusing this same minor. The Defendant argued the re-prosecution violates his Constitutional rights because the Dual Sovereignty Doctrine, which allows two prosecutions for the same offense by independent sovereigns, violates the Double Jeopardy Clause of the Fifth Amendment. In addition, the Defendant argued that the *Bartkus 2* exception to the Dual Sovereignty Doctrine applies here because there

was law enforcement and institutional collusion between the federal government and the White Mountain Apache Tribe. The Court held that the *Bartkus* exception does not bar the re-prosecution by the federal government, denied the Defendant's motion to dismiss counts I and II, and denied the Defendant's request for an evidentiary hearing.

98. ***DeCoteau v. District Court,*** No. 4:12–030, 2012 WL 2370113 (D.N.D. 2012). Before the Court was the Respondent, the District Court, 85th Judicial District, Brazos County, State of Texas's motion to dismiss. Tyrell DeCoteau asserts that he and the Respondent, Francyne DeCoteau, were married in Bottineau, North Dakota. They have two minor children. They are members of the Turtle Mountain Band of Chippewa Indians. Tyrell DeCoteau is a member of the United States Army and is currently stationed in El Paso, Texas. Francyne DeCoteau resides with the children in College Station, Texas. On an unknown date, Tyrell DeCoteau filed for divorce in the Turtle Mountain Tribal Court. Francyne DeCoteau filed for divorce in the Texas State District Court in Bell County, Texas. The Texas State District Court issued a temporary restraining order; the Texas State District Court issued an employer's order to withhold income; and the Texas State District Court issued a supplemental temporary order. On May 1, 2006, the Turtle Mountain Tribal Court (Tribal Court) issued an order finding that it had exclusive jurisdiction over the divorce and child custody matter and further found that the Texas orders were null and void. The Tribal Court ordered that the parties share joint custody of the children. Thereafter, the Tribal Court issued an order granting a dissolution of the DeCoteaus' marriage. Later, the Tribal Court issued an order granting Tyrell DeCoteau custody of the children for one year effective June 15, 2011. On January 6, 2012, the Tribal Court issued an arrest warrant for Francyne DeCoteau for noncompliance with the court's orders. On March 19, 2012, Tyrell DeCoteau filed a motion in Federal District Court seeking the following relief: (1) the Petitioner have judgment against Respondents whereby this Court issue a Temporary Restraining Order preventing Respondent District Court, 85th Judicial District, Brazos County, State of Texas from taking jurisdiction of the custody action in Texas until the parties have exhausted Tribal Court remedies; (2) the Court issue a declaratory judgment declaring the Tribal Court has exclusive jurisdiction under Texas laws and Tribal laws, the Tribal Court Orders are enforceable under the rule of comity and that the warrant for Respondent Francyne DeCoteau's arrest is valid and enforceable, and the Bureau of Indian Affairs must make arrangements to extradite the Respondent Francyne DeCoteau

back to the Turtle Mountain Tribal jurisdiction; and (3) the Court issue a permanent injunction against the Respondent Francyne DeCoteau ordering her to cease and desist in pursuing this matter in the Texas courts and ordering Respondent District Court, 85th Judicial District, Brazos County, State of Texas from taking jurisdiction of the custody action in Texas. On April 30, 2012, the District Court, 85th Judicial District, Brazos County, State of Texas ("Texas State District Court") filed a motion to dismiss under Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. The Texas State District Court argued the Court does not have jurisdiction and DeCoteau's claim is barred. DeCoteau did not file a response to the motion. DeCoteau has failed to respond to the Texas State District Court's motion, and the Court takes that failure as an admission that the motion is well taken. In addition, the Court also finds as a matter of law that it does not have subject-matter or personal jurisdiction. The Texas District Court's motion to dismiss was granted.

99. ***Rincon Mushroom Corporation v. Mazzetti,*** No. 10–56521, 2012 WL 2928605 (9th Cir. 2012). Not selected for publication in the Federal Reporter. (From the order.) The petition for panel rehearing is granted. The memorandum filed on April 20, 2012 is withdrawn and replaced by the memorandum filed contemporaneously with this order. Plaintiff, Rincon Mushroom Corporation of America, the owner of a five-acre parcel within the Rincon Band of Luiseno Mission Indians tribal reservation, appealed the District Court's dismissal of its action to enjoin Rincon tribal officials from enforcing tribal environmental and land-use regulations on its property on the ground that Rincon Mushroom has not exhausted its tribal remedies. … The Court is not now deciding whether the tribe actually has jurisdiction under the second *Montana* exception. Where, as here, the tribe's assertion of jurisdiction is "colorable" or "plausible," the Tribal Courts get the first chance to decide whether tribal jurisdiction is actually permitted. If the Tribal Courts sustain tribal jurisdiction and Rincon Mushroom is unhappy with that determination, it may then repair to Federal Court. … However, the District Court abused its discretion in dismissing the case rather than staying it. When "dismissal might mean that [the plaintiff] would later be 'barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations' ... the District Court should ... stay[ ], not dismiss[ ], the federal action pending the exhaustion of tribal remedies." *Sharber v. Spirit Mountain Gaming Inc.,* 343 F.3d 974, 976 (9th Cir. 2003) (citation omitted). Here, at least some of Rincon Mushroom's claims would be time-barred if it had to re-file after exhausting its tribal remedies. For example,

the complaint asserts a claim under 42 U.S.C. § 1985(3)—which is subject to a one-year statute of limitations—challenging conduct that occurred in 2006. *See McDougal v. Cnty. of Imperial,* 942 F.2d 668, 673–74 (9th Cir. 1991). That claim would be time-barred if filed anew tomorrow. Thus, the District Court's dismissal is reversed and the case remanded with instructions to stay the case pending Rincon Mushroom's exhaustion of tribal remedies. Reversed and remanded**.**

L. Tax

100. ***Red Earth L.L.C v. United States***, Docket Nos. 10–3165, 10–3191, 10–3213, 2011 WL 4359919, 657 F.3d 138 (2011). (From the Opinion) "Appeal from an order of the Western District of New York granting a preliminary injunction to stay enforcement of provisions of the Prevent All Cigarette Trafficking Act (PACT Act) that require mail-order cigarette sellers to pay state excise taxes. The government argues that the District Court erred in concluding that the Plaintiffs were likely to succeed on their claim that the PACT Act's provision requiring out-of-state tobacco sellers to pay state excise taxes regardless of their contact with that state violates due process. We affirm the District Court's order granting the preliminary injunction. AFFIRMED."

101. ***Confederated Tribes and Bands of the Yakama Indian Nation v. Gregoire***, No. 10–35776, 2011 WL 4430858, 658 F.3d 1078 (9th Cir. 2011). Yakama Indian Tribes brought action against various Washington state officials, challenging the state's cigarette excise tax as violating Indian tax immunity because it purportedly makes retailers on Indian lands liable for payment of tax for sales to non–Indians. The District Court, 680 F. Supp. 2d 1258, granted in part and denied in part the Defendants' summary judgment motion. Yakama Indian Tribes appealed the decision. The Appellate Court held that the legal incidence of tax did not fall upon Indian retailers, but instead fell on non–Indian purchasers. Affirmed.

102. ***United States v. Native Wholesale Supply Co.,*** No. 08-CV-850, 2011 WL 4704221, 822 F.Supp.2d 326 (2011). The United States brought an action against a Native American-owned tobacco importer for failing to pay its quarterly assessments as required by the Fair and Equitable Tobacco Reform Act (FETRA). The United States moved for summary judgment. Following transfer, the parties cross-moved for summary judgment. The Court held that: (1) the Commodity Credit Corporation's (CCC) interpretation of FETRA was reasonable, and

therefore entitled to Chevron deference; (2) the FETRA did not violate the Takings Clause or the Due Process Clause of the Fifth Amendment; and (3) the Native American importers were not exempt from FETRA. Government's motion granted; defendant's motion denied.

103. ***Oneida Indian Nation of New York v. Madison County,*** Docket Nos. 05-6408, 06-5168, 06–5515, 665 F.3d 408 (2nd Cir. 2011). Indian tribe brought actions against counties to enjoin them from assessing property tax on tribe-owned property acquired on the open market and from enforcing those taxes through a tax sale or foreclosure. In the first case, the District Court, 145 F. Supp. 2d 226,145 F. Supp. 2d 268, determined that the property was not taxable and the County appealed. The Appellate Court, 337 F.3d 139, vacated the judgment, and certiorari was granted. The Supreme Court, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386, reversed and remanded. On remand parties cross-moved for summary judgment. The District Court entered summary judgment in favor of the Tribe, 401 F. Supp. 2d 219, and denied County's motion for relief from judgment, 235 F.R.D. 559. County appealed. In the second case, the District Court, 432 F. Supp. 2d 285, entered summary judgment in favor of the Tribe. County appealed, and cases were consolidated on appeal. The Appellate Court, 605 F.3d 149, affirmed, and certiorari was granted. Tribe declared that it waived its tribal sovereign immunity from suit. The Supreme Court, 131 S. Ct. 704, 178 L. Ed. 2d 587, vacated and remanded. On remand, the Appellate Court held that: (1) the Tribe irrevocably waived its claim to tribal sovereign immunity from enforcement of real property taxation through foreclosure by state, county, and local governments; (2) the Tribe abandoned its claim on appeal that Nonintercourse Act's statutory restrictions on alienation of Indian land prohibited counties' tax foreclosures; (3) vacatur of District Court's grant of summary judgment to Indian tribe was proper, to the extent that judgment rested upon doctrine of tribal sovereign immunity and Nonintercourse Act; (4) counties' notices of tax enforcement proceedings provided tribe with sufficient notice of its due-process-protected right to redeem its properties from foreclosure and enable it to take appropriate steps to protect property before redemption period expired; (5) the District Court was required to decline supplemental jurisdiction over tribe's claim that property that tribe acquired on open market was "Indian reservation" property under New York law and thus was exempt from taxation; and (6) counties forfeited their arguments on appeal in opposition to tribe's claim that it was entitled on grounds of equity to declaratory judgment that it did not owe interest or penalties on taxes that accrued prior to the Supreme Court's holding that

overturned prior decisional law under which property purchased on open market was not subject to taxation on ground that tribe possessed sovereign authority over property. Affirmed in part, reversed in part, vacated in part, and remanded with instructions.

104. ***Tonasket, dba Stogie Shop; and David T. Miller v. Sargent,*** No. CV–11–073, 2011 WL 5508992, 830 F.Supp.2d 1078 (2011). Tribally-licensed cigarette retailer and individual brought action against federally-recognized Indian tribe, individual tribal officials, and others, challenging requirement that retailer acquire its cigarettes from certain wholesalers. The Defendants moved to dismiss. The District Court held that: (1) tribe and tribal officials were entitled to tribal sovereign immunity, and (2) the State of Washington was a "necessary party" for the purposes of mandatory joinder. Motion granted.

105. ***Seneca Nation of Indians v. State of New York,*** No. CA 11-01193, 2011 WL 5609815, 89 A.D.3d 1536, 933 N.Y.S.2d 500 (2011). The Plaintiff commenced this action seeking, inter alia, individual declarations that 20 NYCRR 74.6 (hereafter, the rule), concerning taxes imposed on cigarettes on qualified Indian reservations, is null, void and unenforceable based on the failure of the Defendant, New York State Department of Taxation and Finance ("Department"), to comply with §§ 201-a, 202-a, and 202-b of the State Administrative Procedure Act. The Department promulgated the rule in accordance with the statutory mandate governing the sale of tax-exempt cigarettes on qualified reservations to members of an Indian nation or tribe, as well as the collection of the excise tax on cigarette sales to non-members of the nation or tribe. The Court ruled that 20 NYCRR 74.6 is valid and enforceable, and that the Defendant, New York State Department of Taxation and Finance, substantially complied with the State Administrative Procedure Act §§ 201-a, 202-a and 202-b in promulgating that rule and as modified the judgment is affirmed without costs.

106. ***State v. Comenout***, No. 85067-4, 2011 WL 6091351, 173 Wash.2d 235, 267 P.3d 355 (2011). State charged Defendants, who were members of Indian tribe, with engaging in the business of purchasing, selling, consigning, or distributing cigarettes without a license, unlawful possession or transportation of unstamped cigarettes, and first degree theft. The Defendants filed motion to dismiss the charges. The Superior Court denied the motion. The Defendants sought discretionary review. The Appellate Court certified case to the Supreme Court. The Supreme Court held that: (1) the State had nonconsensual criminal jurisdiction over

the Defendants, and (2) the unlicensed store from which the Defendants were allegedly selling unstamped cigarettes was not exempt from state cigarette tax. Affirmed.

107. ***Muscogee (Creek) Nation v. Pruitt***, No. 11–7005, 2012 WL 627967, 669 F.3d 1159 (10th Cir. 2012). Indian tribe brought action alleging that Oklahoma's tobacco tax-stamp scheme violated federal law and tribal sovereignty. The District Court for the Eastern District of Oklahoma dismissed the complaint, and tribe appealed. The Court of Appeals, Matheson, Circuit Judge, held that: (1) the District Court had subject matter jurisdiction over the matter; (2) the requirement that retailers on Indian reservations obtain state tax exemption certificates was not preempted by federal statute; (3) the requirement that tribally-licensed retailers purchase tobacco products from state-licensed wholesalers did not impermissibly infringe on tribal self-governance; (4) the use of probable-demand formula to limit number of tax-free stamps did not impose impermissible burden on tribal self-governance; (5) the State's practice seizing cigarettes outside Indian Country that did not have tax or tax-free stamp did not impermissibly infringe on tribe's sovereignty; (6) the statutes did not unduly interfere with tribal members' ability to buy cigarette brands of their choosing; and (7) the Indian trader statute did not preempt statutes requiring tobacco manufacturers that did not join master settlement agreement (MSA) to pay into escrow fund. Affirmed.

108. ***Mashantucket Pequot Tribe v. Town of Ledyard***, No. 3:06cv1212, 2012 WL 1069342 (D. Conn. 2012). (From the Opinion) "This case concerns the authority of the Defendants, the State of Connecticut (the "State") and the Town of Ledyard (the "Town"), to tax slot machines owned by non-Indian entities leased by plaintiff Mashantucket Pequot Tribe (Tribe). In counts one and two, the Tribe complains that the Town's property tax is preempted by federal law; in count three, the Tribe claims that the tax interferes with its ability to exercise its sovereign functions. The parties have filed cross-motions for summary judgment. . . . [t]he Plaintiff's motion for summary judgment will be granted. The Defendants' motion in limine and motions for summary judgment will be denied."

109. ***United States v. Wilbur***, Nos. 10–30185, 10–30186, 10–30187, 10–30188, 2012 WL 1139078, 674 F.3d 1160 (9th Cir. 2012). Pursuant to their guilty pleas, the Defendants were convicted in the District Court, 2010 WL 519735, of a conspiracy to violate the Contraband Cigarette Trafficking Act (CCTA), and they appealed. The Appellate Court

held that: (1) the Defendants' actions in selling unstamped cigarettes violated CCTA during periods that the Indian tribe's cigarette tax contract (CTC) with state was not in effect; (2) the rules applicable to constructive amendment of indictments or variances which prejudice a defendant's substantial rights did not apply where indictment charged a single continuous conspiracy to violate the CCTA, while the facts showed two separate conspiracies with a gap between them; and (3) neither Treaty at Point Elliott nor Washington law deprived Washington of the power to enforce its cigarette tax laws against reservation Indians' trade of tobacco. Affirmed in part, reversed in part, and remanded.

110. ***Matheson dba Jess's Wholesale v. Smith****,* No. 3:11–05946, 2012 WL 1802278 (D. Wash. 2012). Before the Court were the Defendants' (together, the "State") Motion to Dismiss the Plaintiff's complaint for lack of subject matter jurisdiction and the Plaintiff's motion for a preliminary injunction. The Plaintiff Jessica Mae Matheson is a member of the Puyallup Indian Tribe. The Plaintiff does business in Washington State as a sole proprietorship called "Jess's Wholesale," a licensed Washington cigarette wholesaler. The case arises from a $9.2 million Washington State Department of Revenue tax assessment against the Plaintiff, in connection with her cigarette wholesale business. The Plaintiff unsuccessfully opposed the assessment before the Washington Board of Tax Appeals, and in the Thurston County Superior Court. The case is currently pending in the Washington State Court of Appeals. The Plaintiff alleged primarily that the State (and its agents and employees) did not have the authority to tax her business and that the State knew it. She claims to be the only female registered Indian ever granted a Washington State wholesale license and claims that the taxing authority has discriminated against her both because she is female and because she is an Indian. The Plaintiff asserted six broad claims for relief including a declaratory judgment that she is not subject to the tax and enjoining the State from attempting to collect the assessment at issue in state court. The State sought dismissal of all of the Plaintiff's claims under Fed. R. Civ. P 12(b)(1) and (6), arguing that the Tax Injunction Act (28 U.S.C. § 1341) deprives the federal court of subject matter jurisdiction to hear the Plaintiff's injunction, declaratory judgment, and damage claims, because she has a plain, speedy, and adequate remedy for those claims in state court. The Court found that the Tax Injunction Act deprives the court of

subject matter jurisdiction over the Plaintiff's injunctive, declaratory and damages claims. The Court granted the State's motion to dismiss, dismissed the Plaintiff's claims, and denied her motion for preliminary injunction.

111. ***Miccosukee Tribe Of Indians Of Florida v. United States***, No. 11–23107, 2012 WL 2872166, 877 F.Supp.2d 1331 (2012). Before the Court was the Respondent's, the United States of America, motion to deny petitions to quash. On August 29, 2011, the Tribe filed a petition to quash summons to Morgan Stanley Smith Barney in Case No. 11–23107, seeking to quash a summons issued to Morgan Stanley Smith Barney ("Morgan Stanley") on August 9, 2011 for select documents encompassing calendar year 2010. The Court rejected the Tribe's argument that sovereign immunity barred the Internal Revenue Service's ("IRS") issuance of a summons to Morgan Stanley seeking production of records for the tax years 2006 through 2009 for accounts belonging to the Tribe's former chairman. The Court concluded the Government has met all four Powell (*United States v. Powell*, 379 U.S. 48) factors in demonstrating its summonses may be enforced. The Tribe has failed to meet its heavy burden of refuting the Government's showing or otherwise demonstrating that enforcement would be an abuse of the Court's process.

112. ***United States v. Morrison***, Nos. 10–1926, 10–1951, 2012 WL 2877648, 686 F.3d 94 (2nd Cir. 2012). The Defendant was charged by indictment with a Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy and multiple other crimes. Following denial of the Defendant's motion to dismiss the indictment, 521 F. Supp. 2d 246, and a jury verdict finding the Defendant guilty of a RICO conspiracy and being a felon in possession of a firearm, the Defendant moved to dismiss the RICO charge or for a new trial. The District Court, 596 F. Supp. 2d 661, denied the motion, and the Defendant moved for reconsideration. The District Court, 706 F. Supp. 2d 304, granted reconsideration in part, vacating the RICO conviction. The parties cross-appealed. Morrison claimed that the CCTA was inapplicable to him given New York's "forbearance policy," under which the State refrained from collecting taxes on cigarette sales transacted on Native American reservations. According to Morrison, this forbearance policy barred his conviction under the CCTA because that statute provides that, in order for a federal prosecution to lie, the state in which the allegedly contraband cigarettes are found must "require" tax stamps to be placed on cigarettes. The Appellate Court held that: (1) prior certification to the New York Court of Appeals of questions regarding the New York Tax Law section delineating the parameters of a

Contraband Cigarette Trafficking Act (CCTA) violation did not support a determination that the section was unconstitutionally vague and (2) the Defendant could be validly convicted under the CCTA, even though, at the time, the State was refraining from enforcing taxes on on-reservation sales. Reversed and remanded.

M. Trust Breach and Claims

113. ***Jicarilla Apache Nation v. United States****,* No. 02-25L, 2011 WL 3796273, 100 Fed.Cl. 726 (2011). In tribal trust case, Jicarilla Apache Nation filed suit against the United States seeking an accounting and to recover for monetary loss and damages relating to the government's breach of fiduciary duties by failing to pool Nation's trust funds with those of other tribes for investment purposes and by immediately removing funds from trust fund to cover disbursement check, thereby creating lag between removal of funds and check negotiation during which time no income was earned on funds. The government moved for partial summary judgment on pooling and disbursement lag claims, and Nation cross-moved for partial summary judgment on disbursement lag claim. The Court held that: (1) the claims that the government violated its duty to maximize trust income by prudent investment are within Indian Tucker Act jurisdiction; (2) the pooling claim fell within Indian Tucker Act jurisdiction; (3) the fact issues precluded summary judgment as to pooling claim; but (4) the disbursement lag claim was not within Indian Tucker Act jurisdiction. The Plaintiff's motion denied; the Defendant's motions denied for one claim and granted for other claim.

114. ***Samish Indian Nation v. United States***, No. 2010–5067, 657 F.3d 1330 (2011), Rehearing and *rehearing en banc d*enied (2012). Indian tribe brought action against the United States under Tucker Act and Indian Tucker Act to recover compensation for benefits it would have received under Tribal Priority Allocation (TPA) system and Indian Health Service (IHS) funding process but for Department of Interior's (DOI) improper omission of the Tribe from list of federally recognized tribes. The Court of Federal Claims, 82 Fed. Cl. 54 and 90 Fed. Cl. 122, dismissed the complaint, and the Tribe appealed. The Appellate Court held that: (1) the statutes relating to TPA system were not money-mandating; (2) the State and Local Fiscal Assistance Act of 1972 was money-mandating; and (3) the Antideficiency Act did not limit the Tribe's recovery for funds under State and Local Fiscal Assistance Act of 1972. Affirmed in part, reversed in part, and remanded.

115. ***Nez Perce Tribe v. United States***, No. 06–910, 2011 WL 4498762, 101 Fed.Cl. 139 (2011). The Nez Perce Tribe alleged that the United States has breached its duties as trustee of certain assets of the Tribe, resulting in financial losses. *See Nez Perce Tribe v. United States*, 83 Fed. Cl. 186, 187 (2008). Almost immediately after commencing this action, the Tribe filed an action in the U.S. District Court for the District of Columbia (the "District Court"), *Nez Perce Tribe v. Kempthorne*, No. 1:06–cv–02239, alleging the same operative facts but seeking different relief. Because the filing progression was initially in doubt, the Court issued an order to show cause directing the Tribe to demonstrate why its case should not be dismissed under 28 U.S.C. § 1500, which denies jurisdiction to this court over "any claim for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States." The Court established that the case brought in this Court was filed before the action was commenced in the District Court and ruled that § 1500 consequently was no bar because "Nez Perce's complaint in the District Court was not 'pending' when the Tribe filed its complaint in this Court." *Nez Perce,* 83 Fed. Cl. at 195. The government requested that the Court reexamine its subject matter jurisdiction under § 1500 and dismiss the complaint in light of a recently issued Supreme Court decision interpreting and applying that statute, *United States v. Tohono O'odham Nation*, __ U.S. __, 131 S. Ct. 1723 (2011). The parties do not dispute that this case and the action filed in the District Court rest on the same operative facts. Neither do they contest that the instant suit was filed before that action was commenced in the District Court, albeit only by a few hours. The setting for application vel non of § 1500 is thus complete for purposes of the government's motion to revisit the jurisdictional issue. In essence, the government contends that a later-filed action in another court divests this Court of jurisdiction over an earlier-filed action, so long as both suits are based on the same operative facts. The government's motion to dismiss for lack of subject matter jurisdiction was denied.

116. ***Cobell v. Salazar***, No. 96-01285, 2011 WL 4590776, 816 F.Supp.2d 10 (2011). Following final judgment approving a $3.412 billion settlement in class action involving allegations that the United States breached its trust obligations by mismanaging the money, land and resource assets of more than 450,000 Indians, the Plaintiffs filed motions for appeal bonds to be imposed against appellants. The Court held that attorney fees that could be assessed on appeal were not taxable as costs covered by appeal bonds. Motions denied.

117. ***Wolfchild v. United States***, Nos. 03-2684L, 01-568L, 2011 WL 5075078, 101 Fed.Cl. 92 (2011). The government moved for reconsideration of a partial final judgment of the Court of Federal Claims, 101 Fed. Cl. 54, granting awards, pursuant to the Indian Tribal Judgment Funds Use or Distribution Act, to approximately 20,750 persons of Indian descent on their claims for revenue derived from use of lands reserved for eligible Indians. The Court of Federal Claims held that upon Reports Elimination Act's repeal of Secretary of the Interior's duty under Indian Tribal Judgment Funds Use or Distribution Act to submit to Congress a plan for the use and distribution of the funds to pay a judgment of the Court of Federal Claims to any Indian tribe, the Court of Federal Claims regained its general powers of effectuation of its judgments, including by issuing "a remit, remand, and direction to the Secretary of the Interior to provide a report to the court within the time specified in Indian Tribal Judgment Funds Use or Distribution Act." Motion denied.

118. ***Robinson v. United States****,* No. 2:11–01227, 2011 WL 5838472 (E.D. Cal. 2011). This matter was before the Court on the motion of the United States, to dismiss the Plaintiffs, Dennis, Spencer, Rickie, Cynthia and Vickie Robinson's (collectively, "Robinsons" or "Plaintiffs") lawsuit. This lawsuit involves land held in trust by the United States for the benefit of the Indians of the Mooretown Rancheria, also known as the Maidu Indians of California ("Tribe"). The complaint alleged that the Tribe's construction of a casino and other facilities on the land has encroached upon and interfered with the Plaintiffs' rights to a sixty foot, non-exclusive road and utility easement the Plaintiffs allege they own. Specifically, the Plaintiffs allege that, "[b]ased on the United States' awareness and knowledge of the [Tribe's] planned construction activities, it knew or should have known that these activities would adversely affect the easement . . . and that, as a result, these activities would violate the Robinsons' legal rights." The gravamen of the Plaintiffs' complaint is that the United States "took no steps to warn or give notice to the [Tribe] that the planned activities would" interfere with the Plaintiffs' use of the easement, refused to take steps to rectify the alleged damage, and violated its duty to maintain the subject easement. The Court granted the United States' motion to dismiss without leave to amend, holding that the United States' sovereign immunity precluded the Court from exercising subject matter jurisdiction over the Robinsons' claims.

119. ***The Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States****,* No. 2010-5150, 2012 WL 34382, 672 F.3d 1021 (2012). Indian tribes brought actions against the

United States for breach of fiduciary duty in management and payment of royalties on oil and gas production on Indian lands. The actions were consolidated. The Court of Federal Claims, 93 Fed. Cl. 449, granted summary judgment for United States. Tribes appealed. The Appellate Court held that: (1) the Tribes had not been prevented from knowing all material facts that established government's liability; (2) the government's misstatements and omissions did not toll accrual of statute of limitations for their claim; (3) the Tribes should have known that oil and gas leases had not been competitively bid; (4) the Interior Appropriations Act did not reach claims related to trust assets involving losses resulting from terms of contract being suboptimal; (5) the failure to strictly comply with requirements of Non-intercourse Act rendered any resulting conveyance void; (6) the government's unauthorized lease of Indian land to third parties for oil and gas production did not create implied right for lessees to extract oil and gas from that land; and (7) remand was required. Vacated and remanded.

120. ***Richard v. United States***, No. 2011–5083, 2012 WL 1233012, 677 F.3d 1141 (2012). Representatives of the estates of two members of a Sioux Tribe who were killed by an intoxicated driver brought suit claiming that the United States was obligated to reimburse the injured parties for losses sustained. The Court of Federal Claims, 98 Fed. Cl. 278, dismissed for lack of jurisdiction, and the representatives appealed. The Appellate Court held that the "bad men" provision of the Laramie Treaty of 1868 is not limited to governmental actors. Vacated and remanded.

121. ***Timbisha Shoshone Tribe v. Salazar****,* No. 11–5049, 2012 WL 1673654, 678 F.3d 935 (2012). A faction of Indian tribe, purporting to be its tribal council, brought action against the Departments of the Interior (DOI) and the Treasury (DOT), seeking declaratory and injunctive relief from provision of the Western Shoshone Claims Distribution Act which directed that funds appropriated for the Tribe pursuant to a determination of the Indian Claims Commission (ICC) be distributed directly to individual tribe members rather than to any tribal entity, which the Plaintiffs alleged constituted an unconstitutional taking of tribal property and a denial of equal protection. The government moved to dismiss. The District Court, 766 F. Supp. 2d 175, dismissed for failure to state a claim. The Plaintiffs appealed. The Appellate Court held that the Plaintiffs lacked standing. Vacated and remanded with instructions to dismiss for lack of jurisdiction.

122. ***Siemion, dba/White Buffalo Ranch v. Stewert, et al****.,* No. 11–120, 2012 WL 1925743 (D. Mont. 2012). The United States Attorney

for Montana, under 28 U.S.C. § 2679(d)(1) and 28 C.F.R. § 15.4(a), has certified that Scott, Hugs, Stewart, and Ten Bear were acting within the scope of their employment with the BIA at the time of the incidents alleged in Siemion's Amended Complaint. Doc. 43. The certification is "prima facie evidence that a federal employee was acting in the scope of her employment at the time of the incident[,]" *Pauly v. U.S. Dept. of Agri.,* 348 F.3d 1143, 1151 (9th Cir.2003) (quoting *Billings v. United States,* 57 F.3d 797, 800 (9th Cir.1995)). Siemion, as the plaintiff, bears the burden of disproving the certification by a preponderance of the evidence. *Pauly,* 348 F.3d at 1151. To disprove the certification, a court may allow a plaintiff to conduct some discovery provided the plaintiff has alleged "sufficient facts that, taken as true, would establish that the defendants' actions exceeded the scope of their employment." *Iknatian v. U.S.,* 2010 WL 3893610, at *2 (D. Mont. Sept. 28, 2010) (quoting *Stokes v. Cross,* 327 F.3d 1210, 1214 (D.C. Cir. 2003)). Permitting such discovery, however, "must be balanced against the congressional intent 'to protect federal employees from the uncertain and intimidating task of defending suits that challenge conduct within the scope of their employ.'" *Id.,* at *3 (quoting *Brown v. Armstrong,* 949 F.2d 1007, 1011 (8th Cir. 1991)). Siemion has not met her burden. All of the allegations stem from the named Federal Defendants' conduct taken pursuant to their employment. Siemion has not alleged nor has she presented any evidence to demonstrate that any act by any of these Federal Defendants was done in furtherance of their own personal interest or beyond what is ordinarily incidental to duties performed on behalf of their employer. Thus, the Federal Defendants' motion to the extent it seeks to substitute the United States for Scott, Hugs, Stewart, and Ten Bear is granted. The Court has carefully considered the parties' arguments and relevant authority and concludes that the Tribal Defendants' motion to dismiss should be granted. Siemion's claims against Black Eagle and Cabrera are to be dismissed because they are immune from suit in their capacities as Tribal officials. Siemion's claim against Tribal Defendants Tobacco, Snell, Wilhelm, Bends, V. Hill, and T. Hill are to be dismissed for lack of subject matter jurisdiction. To the extent that Siemion alleges that these named Tribal Defendants acted beyond their valid authority, Tribal sovereign immunity may not extend to them. In this event, Siemion's claim against them is appropriately dismissed for lack of subject matter jurisdiction for a different reason. Civil jurisdiction over activities on reservation lands "presumptively lies in the tribal courts unless limited by federal statute or a specific treaty provision. Considerations of comity require the exhaustion of tribal remedies before the claim may be addressed by the district court." Here,

the record does not reflect that Siemion has sought relief in Tribal Court for the claim she asserts here against these named Tribal Defendants, her Tribal Court case involved only the leasing dispute. Accordingly, her claims against the Tribal Defendants must be dismissed.

123. ***Otoe–Missouria Tribe of Indians v. United States***, No. 06–937, 2012 WL 1959437, 105 Fed.Cl. 136 (2012). This case is one of many cases before the Court whereby the Defendant alleges that the case must be dismissed pursuant to RCFC 12(b)(1), relying on 28 U.S.C. § 1500 as interpreted by United States v. Tohono O'odham Nation,__ U.S. __, 131 S. Ct. 1723, 179 L. Ed. 2d 723 (2011) ("*Tohono O'odham*"). In this case, it is undisputed that the Plaintiff filed its complaint in this Court, and then, several hours later and on the same day, filed a complaint in the United States District Court for the Western District of Oklahoma. The Defendant argued that this fact, the order of filing, is irrelevant for purposes of § 1500 and is not pertinent in light of *Tohono O'odham* and, therefore, the case must be dismissed. At 9:01 a.m. Eastern Standard Time on December 26, 2006, Otoe–Missouria filed a complaint with the Court of Federal Claims ("CFC") alleging the Government's mismanagement of tribal assets in trusts. On that same day, a second complaint was filed at 2:04 p .m. Central Standard Time in the United States District Court for the Western District of Oklahoma ("District Court"). In this complaint, Otoe–Missouria alleged that the Government had not provided an accurate accounting of its Trust Fund to the Tribe and requested a declaratory judgment that the government has not provided a complete and accurate accounting of the Trust Fund. The Court denied the Defendant's motion to dismiss.

124. ***Klamath Tribe Claims Committee v. United States***, No. 09–75L, 2012 WL 2878551, 106 Fed.Cl. 87 (2012). The Klamath Tribe Claims Committee (Klamath Claims Committee or plaintiff) sought damages for alleged takings and breaches of fiduciary duty committed by the Department of the Interior ("Interior"). It asserted that Interior failed to disburse funds owed to tribal members and to safeguard treaty-based water rights associated with a dam. On February 11, 2011, the Court granted in part a motion filed by Defendant and dismissed two of Plaintiff's counts for lack of jurisdiction. As to the remaining counts, the Court concluded, under RCFC 19, that a necessary party, the Klamath Tribes (the "Tribes") must be joined. Subsequently, the Tribes declined to participate in this lawsuit. The Court concluded that the Tribes is an indispensable party and that the inability to join it in this lawsuit requires that the complaint be dismissed.

125. ***Blackfeet Housing v. United States****,* No. 12–04, 2012 WL 3126771, 106 Fed.Cl. 142 (2012). Before the Court was the Defendant's motion to dismiss pursuant to RCFC 12(b)(1) for lack of subject matter jurisdiction and 12(b)(6) for failure to state a claim. The issue for decision on the Defendant's jurisdictional motion is whether Blackfeet Housing Authority ("Plaintiff") timely filed its complaint for breach of a trust responsibility owed to the tribal authority by the United States, which implicates the merits issue. The Defendant's substantive motion questions whether the breach pleaded rests on a specific statutory trust responsibility. In the final and dispositive Ninth Circuit opinion, the Court held: (1) neither the United States Housing Act of 1937, 42 U.S.C. §§ 1437–1437j (1976), the Indian Housing Act of 1988, 42 U.S.C. §§ 1437aa–1437ee, nor the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101–4243 (the "NAHASDA"), created a trust relationship that imposed fiduciary duties on HUD, *see Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916, 921–28 (9th Cir. 2008); (2) the tribal members had alleged sufficient facts to proceed against HUD under the Administrative Procedure Act, 5 U.S.C. §§ 702–706 (2006), *Marceau*, 540 F.3d at 928–29; and (3) it was inappropriate to consider the merits of the tribal members' claims against the Plaintiff because they had yet to exhaust their tribal-court remedies. On remand the District Court ruled that the tribal members' APA claims stemming from HUD's alleged decision requiring the use of wooden foundations were barred by the six-year statute of limitations set forth in 28 U.S.C. § 2401(a) (2006), because the decision to use wooden foundations in the homes was made no later than November 15, 1977. *See Marceau v. Blackfeet Housing Auth.*, No. CV–02–73–GF–SEH, slip op. at 10–11 (D. Mont. 2011). On June 5, 2012, in an unpublished decision, the Ninth Circuit affirmed the dismissal, ruling:

> [The tribal members'] claim against HUD accrued in the late 1970s, when the agency purportedly decided to require wooden foundations. At that time, [the tribal members] knew about the decision [to construct the homes with wooden foundations] and knew that it affected them.... That [the tribal members] may not have immediately grasped the full impact that HUD's decision might eventually have on them does not mean they knew too little in 1980 to bring an APA challenge.

Marceau v. Blackfeet Housing Auth., No. 11–35444, slip op. at 2–3 (9th Cir. 2012).

The Plaintiff filed its complaint on January 3, 2012, seeking $30 million in damages resulting from HUD's alleged breach of "its trust responsibility to plaintiff." On April 5, 2012, the Defendant moved to dismiss under both RCFC 12(b)(1) and 12(b)(6). The Court found that the Plaintiff had not met its burden to establish subject matter jurisdiction. Even if that ruling were not dispositive, the complaint fails to state a claim upon which this court could grant relief. Accordingly, based on the foregoing, the Clerk of the Court shall dismiss the complaint for lack of subject matter jurisdiction.

N. Miscellaneous

126. ***Winnemucca Indian Colony, v. United States Department of the Interior****,* No. 3:11–cv–00622, 2011 WL 4377932, 837 F.Supp.2d 1184 (2011). The Native American colony brought action seeking declarations as to the identity of legitimate colonial officials and injunctive relief preventing the BIA from interfering with contractors hired by purported Colonial Council Chairman to perform work within the colony against the United States, the Department of the Interior, and the Bureau of Indian Affairs (BIA) and its regional agency. After the Court granted a Temporary Restraining Order (TRO) in relation to the injunction claim, 2011 WL 3893905, the Colony moved for preliminary injunction and the BIA moved to vacate the TRO. The District Court held that the Colony was entitled to a preliminary injunction enjoining the BIA from interfering with activities on colonial land by the purported Chairman or his agents. Injunction motion granted in part and denied in part, and Motion to Vacate denied.

127. ***Large v. Fremont County, Wyoming***, No. 10-8071, 670 F.3d 1133 (10th Cir. 2012). Members of the Eastern Shoshone and Northern Arapaho Tribes filed suit alleging that the county's at-large system for electing commissioners to the county Board of Commissioners violated the Voting Rights Act. Following a bench trial, the District Court declared that the county's scheme violated the Voting Rights Act and rejected the County's proposed hybrid remedial plan and fashioned remedial plan solely consisting of single-member districts. The County appealed. The Appellate Court held that: (1) the County's proposed "hybrid" scheme was not a legislative plan entitled to deference, and (2) the District Court did not abuse its discretion in fashioning a remedial plan solely consisting of single-member districts. Affirmed.

SOVEREIGNTY, SAFETY, AND SANDY: TRIBAL GOVERNMENTS GAIN (SOME) EQUAL STANDING UNDER THE HURRICANE SANDY RELIEF ACT*

Heidi K. Adams**

On January 29, 2013, President Obama signed the Sandy Recovery Improvement Act of 2013,[1] which includes a groundbreaking provision amending the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (Stafford Act)[2] to elevate the standing of American Indian tribes in dealing with disasters. Under the original Stafford Act, the President granted funds to states for disaster preparation and relief where state governors had requested such assistance.[3] State governors could apply for federal funding for "Pre-Disaster Hazard Mitigation" planning for local governments within their respective states,[4] or governors could appeal to the President for emergency funding through a disaster declaration on a statewide basis.[5] Both of these avenues for federal assistance forced tribes to appeal to their state governors in order to request federal disaster preparation and relief funds, as tribes were included within the Stafford Act's definition of "local governments."[6] This framework within the original Stafford Act slowed funding and response

* This is a follow-up piece to the author's article, *Sovereignty, Safety, and Security: Tribal Governments under the Stafford and Homeland Security Acts*, 1 AM. INDIAN L. J. 127 (2012), http://law.seattleu.edu/Documents/ailj/Fall%20Issue/Stafford%20and%20Homeland%20Heidi%20AdamsFinal.pdf.

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[1] The Act is also known as the "Sandy Relief Act," the "Hurricane Sandy Relief Bill," and the "Disaster Relief Appropriations Act of 2013." Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. §§ 5121–5207 (2012)), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf (last visited Apr. 20, 2013).

[2] 42 U.S.C. §§ 5121–5207 (2012).

[3] *See generally id.*

[4] *Id.* at § 5133(d)(1)(A).

[5] *Id.* at § 5191(a).

[6] *Id.* at § 5122(7)(B).

times to emergencies in Indian country,[7] circumvented the special trust relationship between tribes and the federal government,[8] and ultimately threatened tribal sovereignty by making tribes subordinate to and dependent upon state officials.[9]

The Sandy Relief Act encompasses a $50.5 billion package to assist northeastern states in recovering and rebuilding damaged infrastructure following the devastation of Hurricane Sandy in October 2012,[10] and also includes an amendment removing American Indian tribes from the Stafford Act's definition of "local governments" while listing them as separate government entities.[11] Additionally, the provisions include a section allowing the chief executive of a tribe to request directly from the President a major disaster or emergency declaration without the

[7] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS GAO-09-551, ALASKA NATIVE VILLAGES: LIMITED PROGRESS HAS BEEN MADE ON RELOCATING VILLAGES THREATENED BY FLOODING AND EROSION 12 (June 2009), *available at* http://www.gao.gov/new.items/d09551.pdf (last visited Apr. 20, 2013) (describing the difficulty in providing funds under the Stafford Act to tribes in Alaska because many villages are so remote that they fail to qualify under the required cost-benefit analysis due to their isolation and harsh climate). Unless otherwise specified, "Indian country" as referred to in this piece is a combination of both the accepted legal definition under 18 U.S.C. § 1151, which includes Indian reservations, dependent Indian communities, and Indian allotments, and Indian lands not covered under this legal definition, particularly with regard to Alaska Native villages. *See generally* Alaska v. Native Village of Venetie Tribal Government et al., 522 U.S. 520 (1998) (as a result of the holding in this case and the provisions of the Alaska Native Claims Settlement Act of 1971, many Alaska Native villages no longer qualify as "dependent Indian communities," thereby preventing most land held by Alaska Natives in that state from being considered part of "Indian country" for purposes of jurisdiction). "American Indians" and "Natives" as referred to in this paper are used interchangeably as all-inclusive terms for the sake of brevity, and should be considered to reference members of any Indian or Alaska Native tribe, band, nation, pueblo, village, or indigenous community.

[8] The Federal Emergency Management Agency (FEMA) has acknowledged this relationship and the federal government's responsibility to tribal governments throughout its policies. FEMA, FEMA TRIBAL POLICY 4 (June 29, 2010), available at http://www.fema.gov/pdf/government/tribal/fema_tribal_policy.pdf (last visited Apr. 20, 2013).

[9] *See* Heidi K. Adams, *Sovereignty, Safety, and Security: Tribal Governments under the Stafford and Homeland Security Acts*, 1 AM. INDIAN L. J. 127, 141 (2012), http://law.seattleu.edu/Documents/ailj/Fall%20Issue/Stafford%20and%20Homeland%20Heidi%20AdamsFinal.pdf (last visited Apr. 20, 2013).

[10] John Rudolf, *Sandy Relief Passes House Despite Conservative Opposition*, HUFFINGTON POST, Jan. 15, 2013, http://www.huffingtonpost.com/2013/01/15/sandy-relief-measure-passes_n_2480328.html (last visited Apr. 20, 2013).

[11] *See infra* Part I.

involvement of state officials.[12] The Stafford Act amendments were thus designed to "treat all federally recognized Indian tribes as the sovereign governments that they are and [create] a mechanism that affords all tribes the option to request a disaster declaration when a state in which they are located fails to do so."[13]

The language in these provisions of the Sandy Relief Act appears to close this gap in tribal authority created by the Stafford Act. Just as promising, the Federal Emergency Management Agency (FEMA) has already begun its consultations with tribes, and is currently soliciting for public comments to aid federal agencies in creating procedures for tribal emergency and disaster declarations.[14] Thus, while the new Stafford Act provisions are as yet untested in Indian country emergencies, FEMA's proactive approach in partnering with tribal governments serves as an encouraging step for tribes.

At the same time, the Sandy Relief Act provisions fail to address the same issues within the realm of homeland security and acts of terrorism. Under the Homeland Security Act of 2002 (Homeland Act),[15] as with the original Stafford Act, tribes are defined as "local governments" and as such are subordinate to their respective state governments.[16] This system puts the United States at great risk, as "more than twenty-five Indian tribes have jurisdiction over lands that are either adjacent to international borders or are directly accessible to an international border by boat."[17] Roads and critical infrastructure are easily reachable through

[12] *Id.* Sandy Recovery Improvement Act of 2013, sec. 1110, Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. §§ 5170, 5191 (2012)), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf (last visited Apr. 20, 2013).

[13] 159 CONG. REC. H72 (statement of Rep. Rahall), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2013-01-14/pdf/CREC-2013-01-14.pdf (last visited Apr. 20, 2013).

[14] Public comments are welcome through Apr. 22, 2013. *See* Solicitation for Comments Regarding Current Procedures to Request Emergency and Major Disaster Declarations, 78 Fed. Reg. 15,026 (Mar. 8, 2013), *available at* http://www.gpo.gov/fdsys/pkg/FR-2013-03-08/pdf/2013-05391.pdf (last visited Apr. 20, 2013).

[15] 6. U.S.C. § 101(10)(A)–(B) (2003).

[16] *Id.* at § 101(11)(B).

[17] 151 CONG. REC. S1868 (statement of Sen. Dorgan, for himself and Sen. Inouye), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2005-03-01/pdf/CREC-2005-03-01-pt1-PgS1868.pdf (last visited Apr. 20, 2013) [hereinafter Sen. Dorgan S. 477 Statement]. The U.S. General Accountability Office found in 2004 that "[o]f the 562 federally recognized Indian tribes, 36 tribes have lands that are close to, adjacent to, or [cross] over

these areas, leaving tribal lands without adequate protection against illegal border crossings. Moreover, the Homeland Act schema leaves tribes just as vulnerable to domestic acts of terrorism, where there is no clear jurisdictional authority over investigation, response, and prosecution of terrorist acts.[18]

This article first provides an analysis of the important amendments to the Stafford Act through the Hurricane Sandy Relief Act of 2013, showing how the key changes will hopefully trigger government-to-government cooperation between tribes and the United States in dealing with disaster preparation, response, and recovery. Second, this article explores the vulnerabilities of national and international security on tribal lands, as well as unsuccessful congressional attempts to alleviate these risks. This article concludes with suggestions for Congress and tribal advocates in using the success of the Stafford Act amendments to change the Homeland Act and Department of Homeland Security (DHS) policies and procedures in order to protect Indian country not only from natural disasters, but also from human-made emergencies.

I. SANDY RELIEF ACT RESTORES TRIBAL SOVEREIGNTY THROUGH STAFFORD ACT AMENDMENTS

The Sandy Relief Act amends the Stafford Act in two important ways for tribal governments. First, the term "local governments" throughout the Stafford Act has been altered, identifying tribal governments as entities separate from state and local governments.[19]

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international boundaries with Mexico or Canada." U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS GAO-04-590, BORDER SECURITY: AGENCIES NEED TO BETTER COORDINATE THEIR STRATEGIES AND OPERATIONS ON FEDERAL LANDS 5 (June 2004), *available at* http://www.gao.gov/assets/250/243053.pdf (last visited Apr. 20, 2013).

[18] The Homeland Act defines terrorism as "any activity that (A) involves an act that (i) is dangerous to human life or potentially destructive of critical infrastructure or key resources; and (ii) is a violation of the criminal laws of the United States or of any State or other subdivision of the United States; and (B) appears to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping." Homeland Security Act of 2002, sec. 2(15), Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. § 101 (2012)), *available at* http://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf (last visited Apr. 20, 2013).

[19] Sandy Recovery Improvement Act of 2013, sec. 103, Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. § 5123 (2012)), *available at*

Second, Congress has added a section to the Stafford Act specifically authorizing tribal executive officials to make requests directly to the President for a major disaster or emergency declaration.

A. "Local Governments" and References

Under Section 103, "References," the Sandy Relief Act stipulates (amending 42 U.S.C. § 5123): "Except as otherwise specifically provided, any reference in this Act to 'State and local', 'State or local', 'State, and local', 'State, or local', or 'State, local' (including plurals) with respect to governments or officials and any reference to a 'local government' in sections 406(d)(3) [of the Stafford Act] is deemed to refer also to Indian tribal governments and officials, as appropriate."[20] While the language in this stipulation appears to maintain the status quo set by the original terms of the Stafford Act, this definitional construction is not triggered because of other linguistic changes throughout the Act. Instead, each reference in the newly amended Stafford Act specifies "State, Tribal, and local" throughout the text, unless the provision applies only to Tribal governments and officials.[21]

Also under this section, the Act directs that "[i]n issuing the regulations, the President shall consider the unique conditions that affect the general welfare of Indian tribal governments."[22] While the directive for the President to "*consider* the unique conditions" seems somewhat flaccid, the use of "shall" indicates a legal requirement to do so, which may inform a system of accountability through the President's policies and enforcement.[23] The fact of this addition also represents and further solidifies the federal government's aim to treat tribal governments as sovereign nations, symbolizing the federal commitment to strengthening meaningful government-to-government relationships with tribes.[24]

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http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf (last visited Apr. 20, 2013).

[20] *Id.*

[21] Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. §§ 5121–5207 (2012)), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf (last visited Apr. 20, 2013).

[22] *Id.* at sec. 103(e)(2).

[23] *Id.* (emphasis added).

[24] The Navajo Nation issued a press release following the passage of the Sandy Relief Bill, calling it "a welcoming sign of the blossoming recognition nationally of the sovereignty of the Navajo Nation as a co-equal government within the United States."

B. Section 1110: Tribal Requests for a Major Disaster or Emergency Declaration

Sections 401 and 501 of the Stafford Act, respectively pertaining to major disaster declaration requests and emergency declaration requests, now allow that "[t]he Chief Executive of an affected Indian tribal government may submit a request for a declaration by the President."[25] Rather than requiring tribal governments to ask their state governors to submit these requests as under the former framework, tribes now have the option to submit requests directly to the President. By using the term "may" in this provision, tribes can continue working with their state governors if they so choose or they can exercise their authority to contact the President's office without notice to or permission from state governments. The choice provided to tribes in this provision thus strengthens tribal governmental sovereignty, allowing tribal leaders full control over actions on behalf of their communities.

Importantly, tribes wishing to request a major disaster or emergency declaration from the President may do so notwithstanding the legal status of the affected tribal land. Many federal laws, including environmental statutes, confine tribal authority to the boundaries of "Indian country" as defined in 18 U.S.C. § 1151.[26] Statutes restricting tribal jurisdiction to Indian country thus only apply to reservations, trust allotments, and dependent Indian communities where the federal government holds superintendence over the land and has set aside the area "for the use of the Indians as Indian land."[27] Because of this system and the unique status of lands in Alaska following the Alaska Native Claims Settlement Act of 1971, Alaska Native tribes are either excluded or require special statutory provisions referring to their non-Indian country

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Jared King, *Bipartisan Disaster Relief Bill Approved: Tribes To Be Treated Like States, Navajo President Encouraged*, NAVAJO NATION WASHINGTON OFFICE, Jan. 29, 2013, http://nnwo.org/content/bipartisan-disaster-relief-bill-approved (last visited Apr. 20, 2013).

[25] Sandy Recovery Improvement Act of 2013, sec. 1110, Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. §§ 5170, 5191 (2012)), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf (last visited Apr. 20, 2013).

[26] *See, e.g.,* 40 C.F.R. § 144.3 (2011), which instructs the Environmental Protection Agency (EPA) to use the 18 U.S.C. § 1151 definition of "Indian country" when determining what constitutes "Indian lands" under the Solid Waste Disposal Act (SWDA), 42 U.S.C. §§ 6901–6992 (as amended through Pub. L. No. 107-377) (2012), and the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f–300j (2012).

[27] 18 U.S.C. § 1151 (2006); Alaska v. Native Village of Venetie Tribal Government et al., 522 U.S. 520, 527 (1998).

lands.[28] But the Sandy Relief Act amendments to the Stafford Act do not constrain tribal governments by linking their authority to lands within the definition of Indian country; instead, the amendments center around a definition of "Indian tribal government" as "the governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe under the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. § 479a et seq.)."[29] Through the Sandy Relief Act, Congress thus uses "Indian tribal governments" as the defining factor triggering the use of the Stafford Act in a major disaster or emergency, rather than tying tribal power to a land base that could exclude various tribes. This is vital not only in elevating tribes to a status equal to that of states, but also in ensuring that the 565 federally recognized tribes in the United States are treated equally to each other under this law.

II. DANGEROUS GAPS IN HOMELAND SECURITY REMAIN FOR AMERICAN INDIAN TRIBES

Building on the momentum of the Stafford Act amendments, Congress should also amend the Homeland Act to elevate the standing of tribes within the paradigm of national security. Three bills have been introduced in Congress attempting to amend the Act since its enactment in 2002, but none have successfully passed House and Senate votes.[30] The current iteration of the Homeland Act thus puts Indian tribes, and the rest of the United States, at risk for illegal border crossings and international and domestic acts of terrorism.

[28] 43 U.S.C. §§ 1601–1633 (2012).
[29] Sandy Recovery Improvement Act of 2013, sec. 1110, Pub. L. No. 113-2, 127 Stat. 48 (2013) (codified as amended at 42 U.S.C. § 5122 (2012)), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-113publ2/pdf/PLAW-113publ2.pdf (last visited Apr. 20, 2013).
[30] *See* Tribal Government Amendments to the Homeland Security Act of 2002, S. 578, 108th Cong. (2003), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-108s578is/pdf/BILLS-108s578is.pdf (last visited Apr. 20, 2013); H.R. 2242, 108th Cong. (2003), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-108hr2242ih/pdf/BILLS-108hr2242ih.pdf (last visited Apr. 20, 2013); S. 477, 109th Cong. (2005), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-109s477is/pdf/BILLS-109s477is.pdf (last visited Apr. 20, 2013).

A. The Homeland Security Act of 2002

The Homeland Act, signed by President George W. Bush and enacted on November 25, 2002, in response to the 9/11 terrorist attacks, was intended to consolidate all national security responsibilities into one manageable agency.[31] To that end, the Homeland Act established the Department of Homeland Security (DHS), which is currently tasked with five core missions: "(1) Prevent terrorism and [enhance] security; (2) Secure and manage our borders; (3) Enforce and administer our immigration laws; (4) Safeguard and secure cyberspace; [and] (5) Ensure resilience to disasters."[32] In fulfilling these missions, DHS is not responsible for investigating, enforcing, and prosecuting specific homeland security issues and incidents; instead, the Homeland Act requires that DHS coordinate and support the efforts of federal, state, and local law enforcement agencies.[33]

Similarly to the original Stafford Act definition, "local government" under the Homeland Act includes "an Indian tribe or authorized tribal organization, or in Alaska a Native village or Alaska Regional Native Corporation."[34] And as with the pre-Sandy implementation of the Stafford Act, the Homeland Act allows federal agencies to distribute funding to states for use by state and local governments in preparing for and responding to homeland security threats, thereby treating tribes "as if tribal governments were political subdivisions of each State."[35] Thus, despite the positive amendments in 2013 to the Stafford Act, DHS-supported prevention, preparedness, recovery, and response mechanisms to terrorism-related disasters still subject tribes to state supervision and control, and continue to controvert tribal sovereignty and federal law and policy.[36]

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[31] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, *available at* http://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf (last visited Apr. 20, 2013); *see* President's Message to the Congress Transmitting Proposed Legislation to Create the Department of Homeland Security, 1 PUB. PAPERS 1006 (June 18, 2002), *available at* http://www.gpo.gov/fdsys/pkg/PPP-2002-book1/pdf/PPP-2002-book1-doc-pg1006-2.pdf (last visited Apr. 20, 2013).

[32] *Our Mission*, U.S. DEPARTMENT OF HOMELAND SECURITY, http://www.dhs.gov/our-mission (last visited Apr. 20, 2013).

[33] Homeland Security Act of 2002 sec. 101(b)(2), Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. § 111 (2012)), *available at* http://www.dhs.gov/xlibrary/assets/hr_5005_enr.pdf (last visited Apr. 20, 2013).

[34] *Id.* at sec. 2(10)(B) (codified as amended at 6 U.S.C. § 101 (2012)).

[35] Sen. Dorgan S. 477 Statement, *supra* note 17.

[36] Adams, *supra* note 9, at 137–41.

B. Security Vulnerabilities in Indian Country

Tribal communities and lands are just as vulnerable to acts of terrorism as other parts of the country, and potential threats to critical infrastructure and international borders on tribal lands place both tribal communities and surrounding areas at risk.[37] Aside from the more than twenty-five tribal communities on United States borders with Canada and Mexico, most tribal lands contain resources or infrastructure that could cripple entire regions of the country if targeted by terrorists. These risk points include "dams, water impoundments, reservoirs, and electrical generation plants," oil and gas fields and pipelines, major transportation lines, communications systems, agricultural sources, and tourist attractions.[38] Moreover, "as tribal communities rank at or near the bottom of nearly every social, health and economic indicator, and as tribal communities are confronted with rather complex, misunderstood and confusing jurisdictional issues, their tribal lands and the borders to which their lands are adjacent or in close [proximity] may only be minimally protected."[39]

While many tribes have taken the initiative to train law enforcement in routing out national security breaches and responding to terrorism in Indian country, most lack the funding and support from other jurisdictions

[37] For more discussion and specific instances of homeland security breaches on tribal lands, *see* William R. Di Iorio, *Mending Fences: The Fractured Relationship between Native American Tribes and the Federal Government and Its Negative Impact on Border Security*, 57 SYRACUSE L. REV. 407 (2006–2007); *see also* Jennifer Butts, *Victims in Waiting: How the Homeland Security Act Falls Short of Fully Protecting Tribal Lands*, 28 AM. INDIAN L. REV. 373 (2003–2004); *see also* Elizabeth Ann Kronk & Heather Dawn Thompson, *Modern Realities of the "Jurisdictional Maze" in Indian Country: Case Studies on Methamphetamines Use and the Pressures to Ensure Homeland Security*, 54 APR FED. LAW. 48 (2007).

[38] NAT'L NATIVE AM. LAW ENFORCEMENT ASS'N, TRIBAL LANDS AND HOMELAND SECURITY REPORT 6–7 (Oct. 2002), *available at* http://www.nnalea.org/hlsecurity/summitreport.pdf (last visited Apr. 20, 2013). For a thorough analysis of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594, which allows federal grant funding directly to Indian tribes upon tribal government request and application in preventing and responding to acts of bioterrorism (and potential dangers to tribal sovereign immunity through the grant process), *see* Erick J. Rhoan, *What Congress Gives, Congress Takes Away: Tribal Sovereign Immunity and the Threat of Agroterrorism*, 19 SAN JOAQUIN AGRIC. L. REV. 137 (2009–2010).

[39] NAT'L NATIVE AM. LAW ENFORCEMENT ASS'N & THE NAT'L CONGRESS OF AM. INDIANS, THE IMPORTANCE OF TRIBES AT THE FRONTLINES OF BORDER AND HOMELAND SECURITY 4–5 (Mar. 2006), *available at* http://www.nnalea.org/tbsp/tbspreport.pdf (last visited Apr. 20, 2013) [hereinafter TBS PILOT PROGRAM].

necessary to operate fully functioning systems of terrorism prevention, response, recovery, and prosecution.[40] Through the Department of Homeland Security Appropriations Act of 2010 and the Implementing Recommendations of the 9/11 Commission Act of 2007, DHS instituted the Tribal Homeland Security Grant Program (THSGP) in 2010.[41] These statutes amended the Homeland Act of 2002, allowing DHS to award federal grants directly to eligible tribes.[42] But the grant application requirements are stringent, requiring tribes to "ensure consistency with any applicable State homeland security plan" by forcing tribal governments to submit their federal grant applications to their respective states for approval before DHS accepts the tribal applications.[43] If a state governor does not approve of a tribe's federal grant application, it can notify DHS of its objections and potentially influence the DHS grant-making authority.[44]

This system allows states to interfere with matters that should be relegated entirely to the tribal-federal relationship. While the Homeland Act does set forth a valid goal—to ensure multi-jurisdictional consistency in homeland security planning—its process for meeting this objective is misguided. Instead of requiring tribes to tailor its security plans and federal grant applications to the plans set by states, which creates a gross power disparity between different government entities, tribes and states should both be required to work together with federal agencies to create comprehensive, jurisdictionally cooperative security plans. In order to achieve this end, the Homeland Act must be amended to place tribes on an equal plane as state governments when working with DHS and other federal authorities. Allowing discretional grant funds on a limited budget as through the current version of the Homeland Act will only placate those

[40] For instance, the National Native American Law Enforcement Association partnered with the National Congress of American Indians and, with the support of DHS, created the "Indian Country Border Security and Tribal Interoperability Pilot Program" (TBSPP) to "comprehensively [assess] tribal border security preparedness generally and in relation to the evolving National Preparedness Goal." The TBSPP thus set a series of baseline measurements for future tribal homeland security program efforts. *See id*. at 1.
[41] *FEMA Fact Sheet: FY 2010 Tribal Homeland Security Grant Program (THSGP)*, U.S. DEP'T OF HOMELAND SECURITY, http://www.fema.gov/pdf/government/grant/tHSGP.pdf (last visited Apr. 20, 2013).
[42] *Id*.
[43] 6 U.S.C. § 606(c) (2012).
[44] If DHS determines that a tribe's application outweighs any state objections and awards grant funds to a tribe, DHS must distribute the funds directly to the tribe, rather than through the state. *Id*. at § 606(d).

who call for recognition of tribal sovereignty and meaningful government-to-government collaboration.

C. Conclusion: Celebrate the Stafford Act Amendments; Push for Homeland Security Changes

At least three bills have been introduced and subsequently died in Congress to amend the Homeland Act that would have ensured full participation of tribal governments in homeland security activities.[45] The late Senator Daniel Inouye of Hawaii co-sponsored two of the senate bills, arguing that "[h]omeland security presents an opportunity to secure a status under federal law that will not only recognize [tribal] powers and responsibilities as sovereign governments, but will strengthen [tribal] position and . . . status in the family of governments that make up the United States."[46] The amended Stafford Act will do just that in the realm of natural disasters and emergencies, allowing tribes the option to exercise their sovereignty by working directly with the federal government to meet the needs of tribal lands and communities.

The Homeland Act should be amended in a way that will reach this same goal; but doing so may not be as tidy as the Stafford Act amendments. Unlike the Stafford Act, the Homeland Act pertains to human-made threats and disasters, and as such, contains a potentially criminal element not present in natural disasters. Thus, tribal government amendments to the Homeland Act must necessarily address the issue of criminal and civil jurisdiction over both Indians and non-Indians, a long-standing point of contention in federal Indian law and policy.[47] Whether members of Congress push for amending the Homeland Act to elevate the standing of tribal governments in dealing with homeland security problems as a means to more aggressively extend tribal jurisdiction over non-

[45] *See* Tribal Government Amendments to the Homeland Security Act of 2002, S. 578, 108th Cong. (2003), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-108s578is/pdf/BILLS-108s578is.pdf (last visited Apr. 20, 2013); H.R. 2242, 108th Cong. (2003), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-108hr2242ih/pdf/BILLS-108hr2242ih.pdf (last visited Apr. 20, 2013); S. 477, 109th Cong. (2005), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-109s477is/pdf/BILLS-109s477is.pdf (last visited Apr. 20, 2013).

[46] *Inouye Ties Sovereignty to Homeland Security*, INDIANZ.COM, Feb. 25, 2003, http://www.indianz.com/News/show.asp?ID=2003/02/25/inouye (last visited Apr. 20, 2013).

[47] A plethora of publications exist documenting these issues, many of which have been shaped by federal statutes and US Supreme Court decisions over the past 190 years.

Indians,[48] or if Congress plans to confer to tribal courts and law enforcement limited jurisdiction over non-Indians in terrorism-related cases,[49] some change must be made. Tribal sovereignty and nationwide homeland security depend upon it.

[48] As in Senator Inouye's first iteration of the bill, which extends the authority of Indian tribal governments over "(A) all places and persons within the Indian country (as defined in section 1151 of title 18, United States Code) under the current jurisdiction of the United States and the Indian tribal government; and (B) any person, activity, or event having sufficient contacts with the land, or with a member of the Indian tribal government, to ensure protection of due process rights." *See* Tribal Government Amendments to the Homeland Security Act of 2002, S. 578, 108th Cong. (2003), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-108s578is/pdf/BILLS-108s578is.pdf (last visited Apr. 20, 2013).

[49] As in the Violence Against Women Reauthorization Act of 2013, Title 9, Pub. L. 113-4, *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113s47enr/pdf/BILLS-113s47enr.pdf (last visited Apr. 20, 2013).

THE RISKS AND BENEFITS OF TRIBAL PAYDAY LENDING TO TRIBAL SOVEREIGN IMMUNITY

Bree R. Black Horse*

INTRODUCTION

Tribal leaders are regularly confronted with the challenge of funding their sovereign nations and providing for their people during this era of economic volatility and stagnant growth. While some tribal nations possess the substantial financial and natural resources necessary to overcome the difficulties associated with achieving self-determination, economic self-sufficiency, and self-governance, the reality is many tribal nations do not. Tribes geographically isolated from urban areas and lacking in natural resources often struggle to not only meet the needs of their people, but also to operate sustainable sovereign nations that provide all of the systems and resources present in modern governments. For these tribes, online payday lending operations may provide a temporary solution.

Opponents of tribal payday lending claim that non-Indian lenders attempt to conduct business with Indian tribes under the guise of the alleged "sovereignty model" in an effort to evade regulations and prosecution. While these critics question the legality and transparency of tribally affiliated payday lending operations, some tribal nations are operating payday lending enterprises consistent with the policies and legal framework of tribal sovereign immunity. Namely, the lending operations executed by the Miami Tribe of Oklahoma serve as an example of a tribally run business entitled to sovereign immunity.

This article begins with an exploration of the payday lending industry and the payday loan itself, emphasizing the arguments for and against allowing payday loans. Next, it will briefly discuss several state and federal efforts to regulate the payday lending industry in order to provide for an understanding of the regulatory entities that will likely

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challenge the right tribes possess to operate payday lending enterprises. With the backdrop of the short-term, small-dollar credit market set, the relationship between tribes and payday lending is introduced.

While organizations argue both sides of the payday lending debate and regulators attempt to take action against the predatory practice, tribes may yet have the opportunity to operate such businesses under the sovereignty model. After a discussion concerning the basic principles of sovereign immunity, the wide array of the arm of the tribe tests implemented by the federal courts of appeals are examined in detail. At the conclusion of the discussion, a universal arm of the tribe test, informed by the trends in the federal courts, is presented and applied to an example entity from a federally recognized tribe.

I. THE PRACTICE AND REGULATION OF THE PAYDAY LENDING INDUSTRY

A. An Examination of the Short-Term, Small-Dollar Credit Market

1. What is a Payday Loan?

A payday loan is a small personal loan secured by direct access to the borrower's bank account, either through a post-dated check or other authorization to withdraw funds from the account on the borrower's next payday. Obtaining a payday loan is relatively simple when compared to the requirements of obtaining a traditional bank-issued loan. Payday lenders often only require verification of an open bank account, a steady source of income, and identification for approval whereas traditional lenders commonly require satisfactory credit history and asset-based collateral to obtain a loan. In general, payday loans range in size from $100 to $1,000, and the average loan term is about two weeks. A payday loan is typically referred to as short-term, small-dollar credit due to the repayment period and the dollar amount of the loan.

Although borrowing is generally concentrated among younger, low-to-moderate-income individuals, research shows that people of most ages and incomes utilize payday loans.[1] More than twelve million Americans

[1] THE PEW CHARITABLE TRUSTS SAFE SMALL-DOLLAR LOANS RESEARCH PROJECT, PAYDAY LENDING IN AMERICA: PART ONE - WHO BORROWS, WHERE THEY BORROW, AND WHY 10 (2012), www.pewtrusts.org/small-loans (last visited Apr. 20, 2013).

use payday loans annually.[2] Significantly, about three-quarters of borrowers obtain a payday loan through a storefront operation, while roughly one-quarter of borrowers acquire a payday loan online.[3] With millions of Americans routinely using this loan method, payday lending has grown into a multi-billion dollar industry. Payday loan users spend approximately $7.4 billion annually at over 36,000 storefront operations and at hundreds of online websites.[4]

2. The Payday Loan Debate

While payday loans are advertised as short-term, small-dollar credit intended for emergency or special use, a majority of borrowers[5] use payday loans to cover ordinary living expenses over the course of months – not for unexpected emergencies over the course of weeks.[6] In reality, a borrower's initial reasons for taking out a payday loan stem from an ongoing need for income, rather than a short-term need to cover an unexpected expense.[7] A typical borrower uses payday loans multiple times a year, and much of this borrowing comes in relatively quick succession once the borrower begins using payday loans.[8] To illustrate, the average borrower takes out eight individual loans of $375 each per year, and spends $520 on interest annually.[9] As a result, the typical borrower is indebted about five to seven months of the year.[10]

Industry advocates and regulators advise consumers that using payday loans for recurring expenses is not an effective use of this high-cost credit, and emphasize that payday loans should be used to cover unexpected expenses for a short period of time.[11] In reality, about two-thirds of borrowers use a payday loan to cover a recurring monthly

[2] *Id.*
[3] *Id.* at 9.
[4] *Id.*
[5] THE PEW CHARITABLE TRUSTS SAFE SMALL-DOLLAR LOANS RESEARCH PROJECT, PAYDAY LENDING IN AMERICA: PART TWO HOW BORROWERS CHOOSE AND REPAY PAYDAY LOANS 9 (2013) (Four times more storefront borrowers used their first payday loan for a recurring expense (69 percent) than an unexpected expense (16 percent)).
[6] THE PEW CHARITABLE TRUSTS SAFE SMALL-DOLLAR LOANS RESEARCH PROJECT, PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 6 (2012), http://www.pewtrusts.org/our_work_detail.aspx?id=327397 (last visited Apr. 20, 2013).
[7] *Id* at 10.
[8] *Id.* at 13.
[9] *Id.*
[10] *Id.* at 13.
[11] *Id. at 11.*

expense,[12] while only one-third of borrowers use a payday loan to deal with an unexpected expense.[13] The controversial lending practices associated with payday loans, such as high interest rates and chronic borrowing, have ignited a fierce debate between consumer advocates, government officials, and representatives of the payday lending industry.

Opponents of payday lending claim that the practice is unethical in nature, preying on overburdened low-income individuals. For instance, the profitability of payday lenders is contingent on repeat borrowing, as a new customer only becomes profitable for the lender after the fourth or fifth loan.[14] Consumer groups also contend that payday loans are expensive debt, with interest rates often exceeding 400% APR.[15] Furthermore, opponents argue that a payday loan is usually impossible to repay by the borrower's next payday.[16] Moreover, most borrowers renew or re-borrow rather than repay their loans.[17] As a result, opponents claim that consumers are trapped in a cycle of debt subject to unfavorable and costly repayment terms.

On the other hand, advocates of payday lending argue that the model is a vital resource to under-banked[18] individuals facing an urgent need to solve temporary problems. In support of this argument, proponents cite the simplicity of the application process, and nearly immediate loan approval followed by a direct disbursement of cash funds. To demonstrate, payday lenders offer instant loan approval or denial decisions, and loan determinations are commonly based on the verification of employment rather than credit history or asset collateral. Advocates conclude that a payday loan is an easily attainable, unsecured

[12] *Id.* (Examples of recurring monthly expense include rent or mortgage payments, food, utilities, car payments, and credit card payments).
[13] *Id.* at 14.
[14] *Id. at* 15.
[15] www.consumer.ftc.gov/articles/0097-payday-loans (last visited Apr. 20, 2013).
[16] THE PEW CHARITABLE TRUSTS SAFE SMALL-DOLLAR LOANS RESEARCH PROJECT, PAYDAY LENDING IN AMERICA: PART TWO HOW BORROWERS CHOOSE AND REPAY PAYDAY LOANS 9 (2013) (The average borrower can afford to pay $50 per two weeks to a payday lender, but only 14 percent can afford the more than $400 needed to pay off the full amount of these non-amortizing loans).
[17] *Id.* at 13-19.
[18] THE FEDERAL DEPOSIT INSURANCE COMPANY ("Under-banked" consumers typically hold a bank account, but also rely on alternative financial services such as non-bank check cashing services, non-bank remittances, pawn shops, rent-to-own services, and payday loans), http://www.fdic.gov/householdsurvey (last visited Apr. 20, 2013).

debt designed to assist a financially challenged borrower in a timely manner.

In an effort to combat the claims of opponents, the payday loan industry trade group issued best practices, and a customer bill of rights.[19] The payday lending industry's stated best practices limit individual loan rollovers and encourage lenders to offer extended repayment plans.[20] Despite the promotion of these standards, marketing and lending practices differ greatly. In light of the recent payday lending debate and inconsistent business practices, most states have taken regulatory action intended to curb predatory practices.

B. State Regulation of the Payday Lending Industry

Currently, payday lending is primarily regulated at the state level through statutes designed to enable, control, or prohibit payday lending. Legislative efforts typically mandate interest caps, limit the number of loans a borrower can take on an annual basis, and implement more consumer-friendly repayment terms. Most states have taken some regulatory action in light of the recent controversy stemming from payday lending practices, but these regulatory schemes range from permissive to prohibitory.

A majority of states take a permissive regulatory approach to payday lending, implementing either minimal guidelines or no regulations at all. Twenty-eight states[21] follow this permissive regulatory approach, under which payday lenders can easily charge triple digit interest rates and dictate stringent repayment terms.

[19] The Community Financial Services of America member best practices, http://cfsaa.com/cfsa-member-best-practices.aspx (last visited Apr. 20, 2013).
[20] *Id.*
[21] Permissive states allow single-repayment loans with APRs exceeding 391%. These states include Alabama, Alaska, California, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Wisconsin, Wyoming. http://www.pewstates.org/research/data-visualizations/state-payday-loan-regulation-and-usage-rates-85899405695 (last visited Apr. 20, 2013).

In states that enact strong consumer protections, the result is a large net decrease in payday loan usage.[22] Moreover, borrowers residing in these states are not driven to seek payday loans online or from other sources in response to stringent regulations.[23] While many states have enacted legislation over the past decade intended to curb predatory payday lending practices, federal regulators have only recently addressed the controversial practices associated with the payday lending industry.

C. Federal Regulation of the Payday Lending Industry

Federal policy on payday lending is swiftly developing, with action both at the congressional and executive levels. Beginning in 2007, Congress enacted a law regulating payday lending practices involving members of the armed services and their families.[24] More recently, the SAFE Lending Act was introduced in the 112th Congress.[25] The Act would require online lenders to abide by the regulations of the state in which the borrower resides.[26] Correspondingly, there was also a similar House Bill introduced in the same session.[27]

The Dodd-Frank Wall Street Reform Act and the Consumer Protection Act of 2010 established the Consumer Financial Protection Bureau.[28] The Bureau was created for the purpose, among other things, of protecting consumers from abusive financial service practices.[29] Accordingly, the Bureau has the authority to regulate payday loans.[30] While the Bureau recently commenced its first field hearing to gather information on the short-term, small-dollar credit market, it has not yet

[22] THE PEW CHARITABLE TRUSTS SAFE SMALL-DOLLAR LOANS RESEARCH PROJECT, PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 22-24 (2012), www.pewtrusts.org/small-loans (last visited Apr. 20, 2013).
[23] *Id.*
[24] 10 U.S.C. § 987, 32 C.F.R. § 232.3 (The Talent-Nelson Amendment to the John Warner National Defense Authorization Act, limits the permissible annual percentage rate and creates structural requirements for certain small dollar loans issued to members of the armed services and their dependents).
[25] SAFE Lending Act, S. 3426, 112th Cong. (2012).
[26] *Id.*
[27] SAFE Lending Act, H.R. 6483, 112th Cong. (2012).
[28] The Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§5301-5641 (2010).
[29] 124 Stat. §1376.
[30] 12 U.S.C. § 5514.

taken measurable regulatory or legal action against payday lenders.[31] However, consumer advocates and federal officials anticipate that the Bureau will play a significant role in the future. Despite the absence of action from the Bureau, the Federal Trade Commission has recently taken an active role in policing the payday lending industry.

The Federal Trade Commission's Bureau of Consumer Protection, while lacking jurisdiction over banks, can exercise authority over the payday lending industry.[32] With regard to payday lenders, the FTC enforces the Federal Trade Commission Act, the Truth In Lending Act, and the Electronic Fund Transfer Act.[33] In 2011, the FTC brought action against numerous payday lenders, including tribal entities, for various deceptive practices in federal district court.[34]

II. THE RELATIONSHIP BETWEEN INDIAN TRIBES AND THE PAYDAY LENDING INDUSTRY

Over the past two decades, the short-term, small-dollar credit market landscape has changed dramatically. While the payday loan industry mainly serves customers and generates revenue through storefront operations, the early twenty-first century has witnessed a migration of payday loan providers to the internet.[35] Consumer advocates and some storefront lenders have cautioned that online payday lending can exploit borrowers because these online loans often occur outside of the reach of state regulators.[36] Although some lenders purport to be state-licensed and to comply with state interest rate caps and loan terms, numerous online lenders claim choice of law from states with no rate caps

[31] Press Release, Consumer Financial Protection Bureau, CFPB Examines Payday Lending (Jan. 19, 2012), http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-examines-payday-lending/ (last visited Apr. 20, 2013).
[32] The Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (2012).
[33] *Id.*
[34] *See* Federal Trade Commission v. AMG Services, Inc., et al. Case No. 2:12-cv-00536, FTC File No. 112 3024 (2012); *and* Federal Trade Commission v. Payday Financial, et al. Case No. 3:11-cv-03017-RAL, FTC File No. 112 3023 (2012).
[35] THE PEW CHARITABLE TRUSTS, A SHORT HISTORY OF PAY DAY LENDING LAW 1 (2012) (citing GARY RIVLIN, BROKE USA: FROM PAWNSHOPS TO POVERTY, INC. – HOW THE WORKING POOR BECAME BIG BUSINESS 54 (2001)).
[36] LAUREN K. SANDERS, ET AL., NATIONAL CONSUMER LAW CENTER, STOPPING THE PAYDAY LOAN TRAP: ALTERNATIVES THAT WORK, ONES THAT DON'T 4-6 (2010) (describing payday loans and the harms they cause consumers), http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-stopping-payday-trap.pdf (last visited Apr. 20, 2013).

or from foreign countries.[37] Notably, a growing number of online lenders claim to be exempt from state law enforcement as a result of tribal sovereign immunity. Controversy has developed with regards to online payday lending operations that evade state regulations by affiliating with Native American tribes.

Sovereign immunity generally precludes tribally run businesses from state regulations.[38] Some tribes have claimed immunity in state and federal courts on behalf of the payday lending entities that consumer groups accuse of charging usurious interest rates to mainly low-income borrowers. Tribally affiliated payday lenders, due to this claim of immunity, are able to operate internet-based payday lending businesses in states where the interest rates charged by lenders exceed those permitted by the state or in states where payday lending is banned all together. This immunity is commonly referred to as the "sovereignty model."

There are more than 560 federally recognized sovereign tribes in the United States, many of which do not benefit from the gaming industry, a proximity to urban centers, or abundant natural resources. For many tribes, geography creates a number of barriers to promoting economic growth. Proponents of tribal payday lending argue that these barriers to economic growth create a need for tribal internet-based opportunities.[39]

Presently, there are at least eleven federally recognized Native American tribes affiliated with payday lending.[40] A majority of the companies offering payday lending services claim ownership and operation by tribes located in Oklahoma, but numerous tribes from California to Wisconsin participate in the payday lending business.

The controversy surrounding tribally affiliated payday lending operations is predominately centered on the tribal lenders' immunity from

[37] CONSUMER FEDERATION OF AMERICA, CFA SURVEY OF ONLINE PAYDAY LOAN WEBSITES 5-6 (2011).
[38] See *infra* note 54.
[39] Native American Financial Services Association, http://www.mynafsa.org/useful-information/nafsa-fact-sheet/ (last visited Apr. 20, 2013) (one of two trade organizations for tribally-affiliated payday lenders).
[40] Big Lagoon Rancheria Band of Yurok and Tolowa Indians; Big Valley Band of Pomo Indians; Cheyenne River Sioux Tribe of Nebraska; Chippewa Cree Tribe; Miami Tribe of Oklahoma; Modoc Tribe of Oklahoma; Otoe-Missouria Tribe of Indians; Santee Sioux Nation of Nebraska; Sokaogon Chippewa Community; Tunica-Biloxi Tribe of Louisiana; United Keetoowah Band of Cherokee Indians.

state regulation and suit. Tribes are entitled to this immunity under the doctrine of tribal sovereign immunity. Tribal businesses may also enjoy the protections of sovereign immunity if they function as an "arm of the tribe." Critics of tribal payday lending and tribal officials disagree as to the legal status of these operations. Under established Federal Indian Law, the only manner in which to resolve the question of whether tribal payday lenders are entitled to the protections of tribal sovereign immunity is to submit tribal payday lending entities to an arm of the tribe analysis.

In order to determine whether tribal payday lending entities operate as an arm of the tribe consistent with the doctrine of tribal sovereign immunity, it is necessary to review the principles of tribal sovereign immunity, and the corresponding arm of the tribe test. First, the history and policies underlying the doctrine of tribal sovereign immunity will be examined. Next, the several arm of the tribe tests used by the federal courts of appeals will be scrutinized. From this point, it is possible to deduct a universal arm of the tribe test by which the immunity question can be resolved. Consequently, this proposed universal arm of the tribe test is applied to a specific tribe that operates payday lending entities.

III. TRIBAL SOVEREIGN IMMUNITY: THE ARM OF THE TRIBE TEST AND PAYDAY LENDING

A. The Doctrine of Tribal Sovereign Immunity

1. The General Principles of Tribal Sovereign Immunity

The Supreme Court of the United States has erroneously implied that the doctrine of tribal sovereign immunity developed almost by accident, resting on a single misinformed decision in the early twentieth century. However, the doctrine of tribal sovereign immunity is firmly established law in American courts.[41] Despite the Court's limited enthusiasm, tribal sovereign immunity is an inherent, retained sovereignty that predates European contact, the founding of the United States, the United States Constitution, and individual statehood. Accordingly, Indian tribes are distinct, independent political communities, retaining their

[41] Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 756 (1998); Turner v. United States, 248 U.S. 354 (1919); *see, e.g.,* Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 510 (1991).

original natural rights as the undisputed possessors of the soil from time immemorial.[42]

Although no longer possessed of the full attributes of sovereignty, Indian tribes are domestic dependent nations entitled to all powers except those they have been forced to surrender to a single superior sovereign, the United States.[43] Tribes are not states, nor part of the federal government.[44] Rather, tribes enjoy a status higher than that of states, because tribes are sovereign political entities possessed of sovereign authority not derived from the United States.[45] Consequently, tribal immunity is a matter of federal law and is not subject to diminution by the states.[46]

The Court has taken the lead in drawing the bounds of tribal immunity, beginning in the late twentieth century, following a surge in tribal economic development. However, Congress, subject to constitutional limits, can alter the bounds of tribal immunity through explicit legislation.[47] Under federal law, the doctrine of tribal sovereign immunity precludes suit against a federally recognized Indian tribe except in instances where Congress has abrogated that immunity or the tribe has foregone it.[48] Accordingly, congressional abrogation or tribal waiver of sovereign immunity cannot be implied, but must be unequivocally expressed.[49] The relevant inquiry with respect to a tribe's exercise of its sovereignty is whether Congress, which exercises plenary power over Indian affairs,[50]

[42] Worcester v. Georgia, 31 U.S. 515, 559 (1832).
[43] Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. at 509 (citing Cherokee Nation v. Georgia, 30 U.S. 1, 13 (1831)); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978).
[44] National Labor Relations Board v. Pueblo of San Juan, 276 F.3d 1186, 1192 (10th Cir.2002).
[45] Native American Church of North America v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir.1959) (Tribes are subordinate and dependent nations possessed of all powers as such, only to the extent that they have expressly been required to surrender them by the United States, and the United States Constitution is binding upon Indian nations only where it expressly binds them or is made binding by Treaty or by some act of Congress).
[46] Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. at 756; *see, e.g.,* Three Affiliated Tribes of Fort Berthold Reservation v. World Engineering, 476 U.S. 877, 891 (1986).
[47] Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. at 759; *see, e.g.,* Santa Clara Pueblo v. Martinez, 436 U.S. at 58.
[48] Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. at 754.
[49] Santa Clara Pueblo v. Martinez, 436 U.S. at 58.
[50] Talton v. Mayes, 163 U.S. 376 (1896).

has limited that sovereignty in any way.[51] With regard to tribal sovereign immunity, Congress has elected to not obstruct the doctrine in an effort to encourage tribal economic development and self-sufficiency.

2. Tribal Sovereign Immunity and Tribal Enterprises

Tribal sovereign immunity applies without distinction between on-reservation or off-reservation activities, and between governmental or commercial activities.[52] Despite criticism that in some instances off-reservation tribal commercial businesses have become disconnected from tribal self-governance, Congress has elected to not abrogate tribal sovereign immunity with respect to these revenue generating business activities. Following the lead of Congress, the Court has upheld the application of tribal sovereign immunity to tribal businesses regardless of location or industry.[53]

Tribal sovereign immunity protects subordinate secular or commercial entities acting as arms of a tribe from state regulation and legal action.[54] Tribal sovereign immunity may extend to the subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity.[55] In order to determine which tribal entities can share in a tribe's immunity, courts implement what is commonly referred to as the "arm of the tribe" test.

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[51] *See* Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 852-53 (1985).
[52] Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. at 754-55.
[53] *Id.*, at 757.
[54] Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc., 585 F.3d 917, 920-21 (6th Cir.2009); Native American Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1292 (10th Cir.2008); Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir.2006); Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040, 1043 (8th Cir.2000); Ninigret Dev. Corp. v. Narragansett Indian Wetuomuch Hous. Auth., 207 F.3d 21, 29 (1st Cir.2000).
[55] *See* Ninigret Dev. Corp. v. Narragansett Indian Wetuomuch Hous. Auth , 207 F.3d at 29 (stating that tribal housing authority "as an arm of the Tribe, enjoys the full extent of the Tribe's sovereign immunity"); Marceau v. Blackfeet Hous. Auth., 455 F.3d 974, 978 (9th Cir.2002) (recognizing that tribal sovereign immunity "extends to agencies and subdivisions of the tribe").

B. The Sovereign Immunity of Tribal Entities: The Arm of the Tribe Test

Although the Court has not directly addressed the issue of which specific tribal entities acting as arms of a tribe are entitled to immunity, the Court has acknowledged that the United States has taken the position that corporate entities may be arms of the tribe entitled to the protections of tribal sovereign immunity.[56] Recognizing that Congress has not imposed any limitations on the application of tribal sovereign immunity to entities acting as arms of a tribe, all of the federal courts of appeals acknowledge that certain tribal corporate entities may enjoy the full extent of a tribe's sovereign immunity under specific circumstances.[57]

Consistent with federal Indian policy, the federal courts have established general rules regarding the application of tribal sovereign immunity derived from the reality of tribes' need to generate revenue through operating tribal businesses. As a threshold matter, an individual member of a federally recognized tribe operating a business entity is not entitled to tribal sovereign immunity.[58] Furthermore, a tribal entity engaged in business does not lose its immunity simply by contracting with non-Indian operators of the business.[59] This is because, as a matter of established federal Indian policy, Indian nations must be encouraged to generate their own revenue to fund their governments and activities. Therefore, tribes must be free to enter into commercial areas where they do not have expertise but have the ability to acquire the necessary expertise through non-Indian operators.[60]

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[56] *See* Inyo County v. Paiute-Shoshone Indians, 538 U.S. 701, 705 n. 1 (2003) (noting that the United States asserted, and the County did not dispute, that a corporation operating a casino was an arm of the tribe for the purposes of sovereign immunity).

[57] *See, e.g.,* Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc., 585 F.3d at 920-21; Seneca-Cayuga Tobacco Co., 546 F.3d at 1292; Allen v. Gold Country Casino, 464 F.3d at 1046-47; Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d at 1042-43; Ninigret Dev. Corp. v. Narragansett Indian Wetuomuch Hous. Auth , 207 F.3d at 29.

[58] Puyallup Tribe, Inc. v. Dept. of Game of State of Wash., 433 U.S. 165, 171-172 (1977); Individual tribal members operating online payday loan companies have claimed tribal sovereign immunity in various court proceedings. S*ee* PayDay Financial, LLC d/b/a Lakota Cash; PayDay Financial, LLC, also d/b/a Western Sky Financial, LLC; and Great Sky Finance, LLC.

[59] *See* Seneca-Cayuga Tobacco Co., 546 F.3d at 1296 (Tribal tobacco company immune despite fact that non-Indians operated company through a management agreement).

[60] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (noting with approval that the tribal business was "operated by non-Indian professional operators, who receive a percentage of the profits").

In the absence of clarifying Court precedent, all of the federal courts of appeals have developed standards for determining which tribally affiliated entities are allowed immunity from regulation and legal suit. Rather than depending on the nature of the business a tribe is conducting through a particular entity, the question of whether tribal immunity is to be extended to the entity depends on whether, in the language of the federal courts, the entity is an "arm of the tribe."[61] According to all the federal courts of appeals, the proper inquiry is whether the entity acts as an arm of the tribe such that its activities are properly deemed to be those of the tribe.[62] Each of the federal courts of appeals applies a unique arm of the tribe test, taking numerous and varied factors into consideration when determining which entities are entitled to tribal sovereign immunity.

In general, the federal courts of appeals implement tests that typically evaluate the creation of the entity, the benefits accorded to the tribe by the entity, the amount of control the tribe exerts over the entity, and whether the policies of tribal sovereign immunity would be served by holding the entity as an arm of the tribe. In the application of the arm of the tribe test, the federal courts vary in complexity and emphasis, often assigning varying weights to a diverse range of factors. While all of the federal courts apply slightly unique tests, the analyses of the First, Eighth, Ninth, and Tenth Circuit Courts of Appeals are representative of the diversity existent in federal Indian law, presented here from the least to most exacting.

1. First Circuit

The First Circuit utilizes an arm of the tribe test contingent upon a single factor. Specifically, the First Circuit analysis solely evaluates the creation of the entity, requiring only that the entity be formed pursuant to tribal law in order to enjoy immunity. In *Ninigret Development Corp. v. Narragansett Indian Wetuomuch Housing Authority*, the court held that a tribal housing authority is entitled to the full extent of tribal sovereign immunity.[63]

[61] Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc., 585 F.3d at 920-921.
[62] Allen v. Gold Country Casino, 464 F.3d at 1046; *see also* Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d at 1043; Ninigret Dev. Corp. v. Narragansett Indian Wetuomuch Hous. Auth., 207 F.3d at 29.
[63] Ninigret Dev. Corp. v. Narragansett Indian Wetuomuch Hous. Auth., 207 F.3d at 21.

Although the issue of tribal sovereign immunity received limited discussion in the opinion, the *Ninigret* court cited the creation of the tribal housing authority pursuant to a tribal ordinance as sufficient justification for holding that the tribal housing authority is an arm of the tribe.[64] A tribal housing authority functions as an arm of the tribe, and thus is entitled to exercise the defense of tribal sovereign immunity. The arm of the tribe test implemented by the First Circuit illustrates the least strenuous test present in the federal court system, hinging only on the method of creation of the entity at issue.

2. Eighth Circuit

The Eighth Circuit employs a more exacting arm of the tribe test than the First Circuit. The Eighth Circuit test assesses the creation, funding, and control of the entity as well as the benefits accorded to the tribe by the entity. In *Hagen v. Sisseton-Wahpeton Community*, the court held that a tribal community college is an arm of the tribe, and thus entitled to tribal sovereign immunity.[65]

The entity at issue in *Hagen* was a tribal community college. The college was created pursuant to tribal law, and the college was chartered as a nonprofit corporation under the tribal constitution.[66] The *Hagen* court found both of these facts to favor the extension of tribal sovereign immunity to the college.[67] After examining the creation of the college, the court addressed the control and funding of the college.

The court also found that the college was sufficiently controlled and funded[68] by the tribe to grant the entity immunity from suit. First, the college's board of trustees is comprised of one enrolled member from each of the tribe's seven districts, which constituted appropriate tribal control of the entity in the view of the court.[69] Significantly, the college was founded to provide direct benefit to tribal members on the reservation by providing post-secondary education.[70] In sum, the college is chartered, funded, and adequately controlled by the tribe for the purposes of

[64] *Id.* at 26-27.
[65] Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d at 1040.
[66] *Id.* at 1042.
[67] *Id.*
[68] *Id.* (The court found that the tribe directly funded the College).
[69] *Id.* at 1043.
[70] *Id.*

providing education to tribal members on Indian land. Therefore, the *Hagen* court concluded, the college functioned as more than a mere business, the college was an arm of the tribe entitled to sovereign immunity.

Similar to the arm of the tribe tests used by the First and Eighth Circuits, the Ninth Circuit analysis also examines the creation, funding, and control of the entity by the tribe. However, the Ninth Circuit test is more exacting than the First and Eighth Circuits as the Ninth Circuit evaluates several additional factors.

3. Ninth Circuit

The Ninth Circuit implements an arm of the tribe test evaluating not only the creation, control[71] and funding of the entity, but also the benefits accorded to the tribe by the entity and the policies of tribal sovereign immunity. Specifically, in regard to the underlying policy considerations of tribal sovereign immunity, the Ninth Circuit evaluates whether the policies of tribal sovereign immunity are served by regarding the entity in question to function as an arm of the tribe. In reaching a conclusion, the court acknowledged that while a casino is no ordinary business, a tribal casino is nevertheless entitled to tribal sovereign immunity because it properly functions as an arm of the tribe.[72]

In *Allen v. Gold Country Casino,* the entity at issue was a tribal casino.[73] As justification for the holding, the court first relied on the findings relating to the method and process by which the casino was created. The formation of the casino was dependent upon tribal, state, and federal approval at numerous levels because the Indian Gaming Regulatory Act (IGRA) governs the process.[74] Importantly, the *Allen* court cited the passage of numerous tribal ordinances in order to create the casino as support for the extension of tribal sovereign immunity.[75] The *Allen* court concluded that the casino was adequately created, owned, and

[71] Allen v. Gold Country Casino*,* 464 F.3d at 1047 (The court, relying on the stringent requirements of IGRA, simply conceded that the casino is without question owned and operated by the Tribe).
[72] *Id.* at 1047-1049.
[73] *Id.*
[74] Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1) (The IGRA requires a tribe to authorize the creation of a tribal casino through both a tribal ordinance and an interstate gaming compact with the respective state).
[75] Allen v. Gold Country Casino*,* 464 F.3d at 1047-1049.

operated by the tribe to sustain a holding that the entity acted as an arm of the tribe.

The *Allen* court additionally relied upon the benefits the casino provides to the tribe and the congressional policies underlying a tribal casino to support the holding that the casino is an arm of the tribe. To begin with, the court determined that the benefit immunity would extend to the tribe would protect the treasury of the tribe; this directly served one of the purposes of tribal sovereign immunity.[76] Moreover, IGRA provides for the creation and operation of Indian casinos to promote "tribal economic development, self-sufficiency, and strong tribal governments,"[77] all of which are corresponding goals of tribal sovereign immunity. Specifically, the compact enabling the creation of the casino provides that the casino will "enable the tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the tribe's government, and governmental services and programs."[78] The court determined that because the tribe owned and operated the casino, there is no question these numerous economic and invaluable social advantages ensure the benefit of the tribe itself.[79]

Under the Ninth Circuit arm of the tribe test, the creation of the entity, the control exerted by the tribe over the entity, the benefits accorded to the tribe by the entity, and the policies of tribal sovereign immunity are examined. However, the arm of the tribe test implemented by the Tenth Circuit dwarfs those of the Frist, Eighth, and Ninth Circuits. The Tenth Circuit illustrates the most complex arm of the tribe test, incorporating six factors to aid in the sovereign immunity determination.

4. Tenth Circuit

The Tenth Circuit represents the most rigorous arm of the tribe test present in Federal Indian Law today. The Tenth Circuit analysis submits six factors for consideration, which range from the intention of the tribe in creating the entity to the details of the financial relationships between the

[76] *Id.* at 1048 (citing Alden v. Maine, 527 U.S. 706, 750 (1999)) (Noting that sovereign immunity protects the financial integrity of States, many of which "could have been forced into insolvency but for their immunity from private suits for money damages").
[77] 25 U.S.C. § 2702 (One of the principle purposes of IGRA is "to ensure that the Indian tribe is the primary beneficiary of the gaming operation).
[78] Allen v. Gold Country Casino, 464 F.3d at 1047-1048.
[79] *Id.* at 1048.

parties involved.[80] Specifically, in determining whether an entity is entitled to tribal sovereign immunity, the Tenth Circuit gives weight to the following factors: (1) the method of the entity's creation; (2) the purpose of the entity; (3) the structure, ownership, and management, including the amount of control the tribe has over the entity; (4) whether the tribe intended for the entity to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entity; and, (6) whether the purposes of tribal sovereign immunity are served by granting the entity immunity.[81]

In *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, the entity at issue was a tribal Economic Development Authority (the Authority), which owned and operated a casino in addition to other enterprises.[82] The governing body of tribes often creates an economic development authority to manage tribal economic and social enterprises. The court held that the Authority enjoys immunity from suit as an arm of the tribe.[83]

The *BMG* court found the first factor, the method of creation of the entity, and the fourth factor, whether the tribe intended for the entity to enjoy immunity, to favor the extension of tribal sovereign immunity based on tribal law and internal tribal corporate documents. Under the first factor, the entity was created pursuant to tribal law.[84] Additionally, the language used by the tribe described the entity as a "wholly owned enterprise of the tribe," which the court noted to naturally suggest that the entity enjoys a close relationship to the tribe.[85] Pursuant to the fourth factor, evaluating whether the tribe intended for the entity to enjoy sovereign immunity, the court found that because numerous tribal ordinances and corporate documents relating to the entity referenced sovereign immunity in a manner that clearly expressed the tribe's belief that the entities were entitled to immunity from suit, this factor also favored extending tribal sovereign immunity.

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[80] *See* Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1181 (10th Cir.2010) (The *BMG* court amended a prior ten factor arm of the tribe test, and adopted a less exacting six factor test. The previous Tenth Circuit arm of the tribe ten factor test can be found in Johnson v. Harrah's Kansas Casino Corp., 2006 WL 463138 (D.Kan. Feb. 23, 2006)).
[81] *Id.* at 1182.
[82] *Id.* at 1178.
[83] *Id.* at 1173.
[84] *Id.* at 1191.
[85] *Id.*

Likewise, the *BMG* court found the second factor and the fifth factor to favor the extension of tribal sovereign immunity because the revenue generated by the Authority is predominately allocated to the tribe itself. Consistent with the second factor, the court found that the entity was created for the financial benefit of the tribe, because the language of the ordinances creating the entity showed intended economic benefit to the tribe, and the profit sharing scheme delegated a majority of the revenue back to the tribe or its members.[86] Similarly, under the fifth factor, the court found that the revenue scheme favored tribal immunity because about 85% of the profits are distributed directly to the tribal government.[87]

The *BMG* court found that while the board and executive level employees were not entirely comprised of tribal members, a sufficient number exercised control to find the third factor in favor of the Authority and immunity. In accordance with the third factor, which focuses on the amount of control the tribe has over the entity, the court found the managerial structures of the Authority and its subsidiary to weigh both for and against the tribe. While the Authority's board of directors are all tribal members and also hold seats on tribal council, the chief financial officer of the Authority, the general manager of the casino, the chief financial officer of the casino, and twelve of the fifteen directors of the casino are non-tribal members.[88] Lastly, under the sixth factor, the court found that the purposes of tribal sovereign immunity would be served in this case because immunity would protect the treasury of the tribe.[89]

5. A Universal Arm of the Tribe Test

While all of the federal courts of appeals apply slightly different tests when determining which tribal entities are entitled to tribal sovereign immunity, adequate consistency exists between the various tests to yield a universal arm of the tribal test by which tribes can create and operate revenue-generating enterprises. This proposed universal arm of the tribe test incorporates several factors present in all of the arm of the tribe tests used by the federal courts of appeals. Moreover, this proposed test incorporates the underlying federal policies of tribal sovereign immunity into the analysis. The factors incorporated into the universal arm of the

[86] *Id.* at 1192.
[87] *Id.* at 1194.
[88] *Id.* at 1192-1193.
[89] *Id.* at 1195.

tribe test are: (a) the method of creation of the entity; (b) tribal control over the entity; (c) benefits accorded to the tribe by the entity; and, (d) whether the policies of tribal sovereign immunity are served by allowing the entity the protections of tribal sovereign immunity. The following section will evaluate criteria necessary to satisfy each factor as informed by previous decisions issued by numerous circuit courts of appeals.

i. Creation of the Entity

The first factor examines the creation of the tribal entity. Under this inquiry, the court should consider whether the entity was created pursuant to tribal law, and whether the entity was dependent upon the tribal government approval and involvement throughout its formation. If the entity was created pursuant to tribal law, this significantly weighs in favor of the application of tribal sovereign immunity to the entity.[90]

ii. Tribal Control over the Entity

The second factor examines the control the tribe exerts over the entity. Here, the court should examine how much influence the tribe has over the structure, ownership, and management of the entity. Additionally, the court should take the membership of the board of directors and executive officers of the entity into account, as well as their method of appointment. If the board of directors or trustees of the entity are members of the tribe, this weighs in favor of extending tribal sovereign immunity to the entity.[91] Similarly, if the chief executive officers of the entity are tribal members or are appointed by the tribe, this also favors immunity.[92]

iii. Benefits the Tribe Receives from the Entity

The third factor examines the economic and social benefits the entity conveys to the tribe. When determining the benefits accorded to the tribe, the court should evaluate the financial contributions made to the

[90] *See, e.g.,* Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d at 1043; Allen v. Gold Country Casino, 464 F.3d at 1046; Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d at 1191-1192;
[91] *See, e.g.,* Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d at 1040; Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d at 1194.
[92] *See, e.g.*, Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d at 1194.

tribe by the entity. Likewise, the court should examine how the revenue is allocated.

With regard to the non-financial benefits conferred on the tribe, the inquiry focuses on whether the entity will further enable the tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenue to support the tribe's government and governmental services and programs.[93]

iv. Policy Purposes of Tribal Sovereign Immunity

The fourth factor examines the policies underlying the doctrine of tribal sovereign immunity, its connection to tribal economic development, and whether those policies are served by granting immunity to the tribal business entity in question.[94] Specifically, the court should consider whether extending immunity to the entity "directly protects the sovereign tribe's treasury, which is one of the historic purposes of sovereign immunity in general."[95]

C. Are Tribal Payday Lenders Entitled to Immunity Under the Arm of the Tribe Test? An Examination of the Payday Lending Operations of the Miami Tribe of Oklahoma

The decisions of the federal courts of appeals regarding tribal sovereign immunity and the corresponding arm of the tribe test, when evaluated together, reasonably inform a universal arm of the tribe test. This universal arm of the tribe test incorporates four factors. These factors evaluate the creation of the entity, the control the tribe has over the entity, the benefits accorded to the tribe by the entity, and determine whether the policies of tribal sovereign immunity would be served by deeming a particular entity in question an arm of the tribe.

To illustrate the application of these factors to tribal payday lending enterprises, the payday lending entities of the Miami Tribe of Oklahoma

[93] *See* Allen v. Gold Country Casino, 464 F.3d at 1046-1047.
[94] *See* Dixon v. Picopa Constr. Co., 772 P.2d 1104, 1111 (Ariz.1989) ("Tribal sovereign immunity should only apply when doing so furthers the federal policies behind the immunity doctrine"); Gavle v. Little Six, Inc., 555 N.W.2d 284, 294 (Minn.1996) (Courts should determine "whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity").
[95] Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d at 1195; Allen v. Gold Country Casino, 464 F.3d at 1047.

(the Tribe) are evaluated. Given the specifics of the Tribe's payday lending operations and the corresponding analysis in the context of the universal arm of the tribe test, this paper concludes that these kinds of tribal payday lending operations do function as arms of the tribe under the law, and are therefore entitled to the protections of tribal sovereign immunity.

The Tribe operates numerous payday lending businesses in a manner consistent with the federal courts of appeals' application of tribal sovereign immunity to entities acting as arms of the tribe. The Miami Tribe of Oklahoma created the payday lending entities pursuant to tribal law, and the tribal government sufficiently controls the actions of the entities. Furthermore, the operation of the payday lending entities has conferred great benefits on the Tribe as a whole, and extension of immunity to the entities would honor the policies underlying tribal sovereign immunity.

The Tribe is a federally recognized tribe comprised of over 3,800 enrolled citizens.[96] The Tribe is associated with the online payday loan providers USFastCash®, AmeriLoan®, and UnitedCashLoans®.[97] The Tribe operates the tribal economic development authority Miami Nation Enterprises, Inc. (MNE), which in turn owns and operates the online payday loan providers in question.[98]

Currently, MNE operates as a political economic subdivision of the Tribe created by the Tribe to pursue economic development opportunities for the good of the Miami Nation and its citizens.[99] MNE oversees tribally owned companies such as Miami Business Services, Miami Cineplex, and ServiceWorld Computer in addition to several payday lending operations.[100] Similar to the tribal Economic Development Authority in

[96] Miami Tribe of Oklahoma, http://www.miamination.com/mto/about.html (last visited Apr. 20, 2013).
[97] Miami Tribe of Oklahoma and MNE Services, Inc., www.usfastcash.com, www.ameriloan.com, unitedcashloans.com (last visited Apr. 20, 2013).
[98] The disclaimer on the websites affiliated with the Miami Tribe claim to be operated by MNE and owned by the Tribe ("MNE, Inc., doing business as USFastCash®/AmeriLoan®/ UnitedCashLoans®, is a tribal lending entity wholly owned and operated by the Miami Tribe of Oklahoma, a Sovereign Nation recognized by the United States government under the Oklahoma Indian Welfare Act of 1936"). *See supra* note 66.
[99] Miami Nation Enterprises Inc. http://www.mn-e.com/ (last visited Apr. 20, 2013).
[100] Miami Nation Enterprises Inc., http://www.mn-e.com/companies (last visited Apr. 20, 2013).

Allen,[101] MNE is the Tribe's economic development authority and likewise enjoys immunity from suit as an arm of the tribe.[102]

1. Was the Payday Lending Entity Created Pursuant to Tribal Law?

MNE and the payday lending subsidiaries were created pursuant to a tribal constitution and through the enactment of specific tribal ordinances, favoring application of tribal sovereign immunity to the entities. To begin with, the constitution of the Tribe creates a Business Committee, which is expressly authorized to enact resolutions and ordinances "to transact business and otherwise speak or act on behalf of the tribe in all matters on which the Tribe is empowered to act."[103] Citing a "critical need for the development of economic activities to provide for the well-being of the citizens of the Miami Tribe," the Business Committee established MNE pursuant to the tribal constitution as "a subordinate economic enterprise of the Miami Tribe of Oklahoma having the purposes, powers, and duties as herein or hereafter provided by tribal law."[104]

The tribal resolution and ordinances establishing MNE specifically authorized MNE to engage in "providing sources of revenue through direct tribal business activities."[105] Consistent with established tribal law, the Tribe enacted a tribal ordinance to permit MNE to engage in the payday lending business.[106] Specifically, the ordinance authorized the Tribe to issue payday loan licenses to MNE.[107]

2. How Much Control Does the Tribe Have in the Operation of the Payday Lending Business?

The Tribe owns, operates, and sufficiently controls both MNE and the payday lending entities. The relationship between the Tribal Council, the Business Committee, MNE, and the payday lending entities is sufficiently close to properly permit the entity to share in the tribe's immunity.

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[101] Breakthrough Management Group, Inc., v. Chukchansi Gold Casino and Resort, 629 F.3d 1173 (10th Cir.2010).
[102] *Id.*
[103] MIAMI CONST., art. VI § 1.
[104] Amended Miami Nation Enterprises Act, §§ 202(a), 101(a).
[105] Miami Tribe of Oklahoma Business Enterprises Act § 102(a).
[106] Miami Tribal Council Res. 04-62 (2002).
[107] *Id.*

MNE's board of directors consists of three members, two of whom must be members of the Tribe.[108] Members of the board of directors are appointed by the Chief of the Tribe, with the advice and consent of the tribal Business Committee.[109] The tribal Business Committee appoints the executive officers of MNE, including the chief operating officer. The CEO of MNE is responsible for the day-to-day operations of MNE, but is accountable to and directed in policy matters by the MNE board of directors. In turn, the MNE board of directors is ultimately answerable to the tribal council.

The tribal ordinance permitting MNE to engage in the payday lending business also imposes substantive and regulatory requirements on MNE's payday loan business, charging the Tribe's Business Committee with ensuring MNE's compliance with the requirements of the ordinance.[110]

3. How Do the Payday Lending Entities Benefit the Tribe?

The operation of the Tribe's payday lending enterprises through MNE confers substantial benefits on the Tribe itself, which favors the conclusion that the entities are in fact arms of the tribe. The revenues from the payday lending operations have been used, among other things, to build a new headquarters for MNE. This is a significant benefit to the Tribe because MNE provides a considerable portion of its revenues to the Tribe's general fund, which enables the operation of the tribal government. Moreover, MNE's payday lending operations also employ many tribal members on the reservations, where MNE headquarters are located. The revenues from the payday lending enterprises have also been used to fund various tribal programs, including a scholarship program for post-secondary education.

[108] Amended Miami Nations Enterprise Act § 202(a); Miami Tribal Council Res. 05-14 (2005).
[109] Miami Tribal Council Res. 05-14 (2005).
[110] Miami Tribal Council Res. 04-62 (2002).

4. Is Immunity Consistent with the Policies of Tribal Sovereign Immunity?

Extending tribal sovereign immunity to MNE's payday lending subsidiaries would adhere to the policies of tribal sovereign immunity. First, MNE operates the payday lending subsidiaries and the Tribe itself exercises considerable control over MNE's actions as previously discussed. Furthermore, extending the Tribe's immunity to MNE and the payday lending operations is consistent with the policies of tribal sovereign immunity for no other reason than that the tribes have been economically and socially benefitted by the payday loan activities.

CONCLUSION

Payday lending itself may be predatory in nature and fall short of a reputable business operation, but in light of difficult economic circumstances, this business model may be a welcomed temporary solution to some tribes' financial challenges. While payday lending is in some respects analogous to the operation of gaming enterprises under the Indian Gaming Regulatory Act, it is by no means an appropriate permanent solution to solve the issue of tribal financial needs. More importantly, if the operation of tribal payday lending enterprises is within the law and policy of tribal sovereign immunity, tribes should be able to profit from this industry. Despite criticism of payday lending, tribes have the right to choose which industries they decide to profit from.

The Court has not yet taken a case addressing the specific kind of business entities, such as payday lending operations, entitled to tribal sovereign immunity. If the current Court is confronted with a case involving a tribally affiliated payday lender, likely deference will not be given to the objective and reasonable tests adopted by the federal courts of appeals. Instead, it is widely anticipated that if the Court were to take up a case involving tribal payday lenders who implement questionable business models and unethical practices, this set of facts would likely result in a harsh curtailment of tribal sovereign immunity. Reigning in sovereign immunity would undoubtedly have a detrimental economic and social impact on Indian Country.

Payday lending must be conducted ethically with regard to the treatment of consumers and recognition must be given to the regulatory frameworks governing the industry outside of Indian Country. Moreover,

tribes should not conduct payday lending over an extended period of time, and if a tribe elects to engage in this business, the tribe should attempt to fly under the radar of the press, federal officials, and the courts. Most importantly, tribally owned and operated payday lenders must act in a manner consistent with the principles of tribal sovereign immunity. Otherwise, a few misinformed tribal nations may abrogate the right to sovereign immunity for all of Indian Country.

AN UNRESERVED ATTACK ON RESERVED WATER RIGHTS: THE STORY OF THE SAN CARLOS APACHE TRIBE'S WATER RIGHTS (OR LACK THEREOF)

Daniel Lee[*] and Jacob J. Stender[**]

INTRODUCTION

The story of the San Carlos Apache Tribe's[1] water rights begins long before white settlers came to the West and appropriated the waters of the Gila River, which runs through the San Carlos Apache Reservation. These waters were and still are sacred to the San Carlos Apache Tribe; they form a core component of the Tribe's culture, society, and belief system. They are also a source of irrigation and drinking water and a means to obtain sustenance, including fish and wildlife.

Courts have recognized and sometimes protected tribes' interests in waters that they have relied on since "time immemorial."[2] Thus, tribes have at times obtained court recognition of "aboriginal" water rights based on longstanding use of water before western settlement.[3] Tribes may also claim reserved water rights under the *Winters* doctrine, which recognizes that an implied tribal right to the amount of water necessary to support a reservation was created when that reservation was formed by the federal government.[4] But the San Carlos Apache Tribe did not have the opportunity to make a claim for aboriginal or reserved water rights to the Gila River because in 1935, the United States unilaterally diminished the Tribe's water rights under the Globe Equity Decree.[5]

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[**] Commissioner, District Court of Maryland; J.D., Seattle University School of Law, 2012; B.A., Psychology, Western Washington University, 2002. I would like to thank Daniel Lee for the opportunity to analyze an interesting and important new wrinkle in the saga of Native American water rights. I would also like to thank the American Indian Law Journal for ensuring the quality of this piece of scholarship. Any opinions expressed herein are my own, and do not necessarily reflect those of other members of the Maryland judiciary.

[1] The San Carlos Apache Tribe is hereinafter referred to as "the Tribe."
[2] *E.g.*, United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983).
[3] *See, e.g.*, *id.*
[4] Winters v. United States, 207 U.S. 564 (1908).
[5] San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1348 (Fed. Cir. 2011). The Globe Equity Decree is hereinafter referred to as "the Decree."

The Globe Equity Decree failed to live up to its name. Equity was not served when the federal government acted as the Tribe's trustee and settled tribal water rights while simultaneously representing adverse parties that sought water rights of their own.[6] Indeed, in 2006, the Tribe forcefully argued to the Arizona Supreme Court that it should not be bound to the Decree because the federal government's representation of the Tribe was severely inadequate.[7] Inadequate representation prevents privity between the represented party and the representing party, keeping the represented party from being bound to the decree under the principle of res judicata.[8] The Tribe argued that because the decree could not be considered binding under res judicata, the Tribe should be able to assert reserved water rights beyond those provided for in the Decree.[9]

The Tribe's arguments were rejected by the Arizona Supreme Court, which held that the Decree effectively precluded the Tribe from asserting any claims to the Gila River beyond those specified in the Decree.[10] Ignoring the fact that the Tribe did not have the resources or legal sophistication to challenge the Decree at the time, the court nevertheless placed blame on the Tribe for not asserting its claims earlier.[11] Moreover, it faulted the Tribe for strategically maneuvering between federal and state jurisdictions so that it could increase the likelihood of bringing a claim for reserved water rights.[12] Even if that is true, who can blame the Tribe? Who can blame the Tribe for trying to seek the most favorable forum for its claims, especially when those claims concern water that runs through its land, near the homes of its members—water the Tribe depends on to meet its members' basic needs?

This Article argues that the Arizona Supreme Court case was wrongly decided. The Court strategically manipulated doctrine to avoid reaching the inevitable and logical conclusion—that the United States took advantage of the San Carlos Apache Tribe in 1934 when it entered into the Globe Equity Decree. This Article also contends that the Tribe should not be bound to that Decree. Part I contains a thorough critique of each portion of the Arizona Supreme Court's reasoning and shows how that

[6] *Id.*
[7] *In re* The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 127 P.3d 882, 897 (Ariz. 2006) [hereinafter Gila River Sys.] (en banc).
[8] *See id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 42(1)(e) (1979)).
[9] *Id.*
[10] *Id.* at 903.
[11] *Id.* at 901.
[12] *Id.*

court effectively denied the Tribe due process of law.[13] Part II argues that legislators should strengthen protections on reserved tribal rights by amending the McCarren Amendment, thereby providing a neutral forum for litigation of water rights.[14] Part III briefly concludes.[15]

I. WHAT WENT WRONG – A DENIAL OF DUE PROCESS AND THE STATUTE OF LIMITATIONS

The Arizona Supreme Court came to its wrongful conclusion in two steps. First, it determined that the scope of the Globe Equity Decree included reserved water rights. Second, it determined that the Decree prevents the assertion of reserved water rights beyond those provided for in the Decree. This Part examines each of these conclusions in turn. Further, it explains how the Arizona Supreme Court misapplied the doctrines of comity and res judicata to reach these results, as well as how those misapplications of law effectively denied the Tribe's constitutional right to due process.

A. The Scope of the Globe Equity Decree

The Arizona Supreme Court erred in concluding that the scope of the Decree included *Winters* reserved water rights. Supreme Court precedent indicates that plain language of the type included in the Decree is insufficient to abrogate reserved water rights. And both the parties to the Decree and the issuing District Court did not display an intent to diminish or abrogate the Tribe's reserved water rights.

Although the Tribe argued that the Decree only applied to water rights gained under state law through prior appropriation, the Arizona court concluded that the plain language of the Decree also addressed federal reserved water rights.[16] The court recognized that federal law governed the scope of the Decree.[17] But it failed to consider federal precedent construing the plain language of statutes, treaties, and contracts between the government and Native American tribes.

In Indian law cases, federal courts have been willing to look past

[13] *See infra* Part I.
[14] *See infra* Part II.
[15] *See infra* Part III.
[16] *Gila River Sys., 127 P.3d* at 895.
[17] *Id.* at 887 ("Federal law dictates the preclusive effect of a federal judgment.").

the plain language of a given document to effectuate the purposes of the tribal rights at issue.[18] In *Minnesota v. Mille Lacs Band of Chippewa*,[19] the tribe signed a treaty that provided that "the said Indians do fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere."[20] Despite this broad, unequivocal language, the Court determined that the treaty failed to abrogate the tribe's hunting, fishing, and gathering rights because it did not specifically mention those rights.[21] Instead, the Court applied two canons of interpretation that "Indian treaties are to be interpreted liberally in favor of the Indians, and that any ambiguities are to be resolved in their favor."[22] Although the language of the treaty was clear, other sources, such as the historical context of the treaty, sufficed to create ambiguity.[23] Further, the Court emphasized that any abrogation of those rights would have likely been compensated, and the absence of compensation indicated that the treaty was not intended as an abrogation.[24] Lastly, the Court noted that "the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights," and would thus be expected to do so if that was their intent.[25]

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[18] *See, e.g.,* Minnesota v. Mille Lacs Band of Chippewa, 526 U.S. 172 (1999) (determining that the plain language of a treaty that purported to relinquish "all" right title and interest to reservation land was not controlling).
[19] *See id.*
[20] *Id.* at 195.
[21] *Id.*
[22] *Id.* at 200. An additional canon provides that language should be interpreted how Native Americans would have interpreted it at the time of its creation. *See, e.g.,* State v. Keezer, 292 N.W.2d 714, 716 (Minn. 1980). This canon would seem not to apply to the situation facing the Tribe because it was not a party to the Globe Equity proceeding. The Tribe would not have had a chance to interpret the language of the Decree at the time of its creation. Thus, by failing to include the Tribe in proceedings regarding its own rights, the parties to the Globe Equity proceedings gained further leverage with which to deprive the Tribe of its federal water rights.
[23] *Mille Lacs Band*, 526 U.S. at 200 ("[T]he historical record refutes the State's assertion that the 1855 Treaty 'unambiguously' abrogated the 1837 hunting, fishing, and gathering."). The Court emphasized that the purpose of the treaty was to remove the tribe from Minnesota. *Id.* But because the executive did not have power to remove the tribe, that part of the treaty was void. *Id.* Thus, the Court determined that the overarching purpose of the treaty would not be served by abrogating the tribe's rights once the removal provision was found invalid.
[24] *See id.*
[25] *Id.* at 195.

The Arizona court's failure to require specific language in order to diminish or abrogate the Tribe's reserved water rights was contrary to federal precedent. The Globe Equity Decree contained broad language similar to that of the treaty in *Mille Lacs Band*.[26] While the treaty in *Mille Lacs Band* purported to relinquish "all rights" and "interests,"[27] the Decree purported to enjoin "all" additional claims of water to the Gila River.[28] But neither the Decree nor the treaty specifically referred to the rights at issue; in *Mille Lacs,* the treaty failed to expressly mention the hunting and fishing rights, while the Globe Equity Decree failed to mention the Apache Tribe's *Winters* water rights.

Following the Court's reasoning in *Mille Lacs Band* would have advanced the purpose of federal reserved water rights, which is to provide water necessary for the reservation.[29] If hunting and fishing rights were considered important enough for the Court to require specific language abrogating those rights in *Mille Lacs Band*, then Indian water rights should receive similar protection because water is an even more fundamental need of the reservation.

The Arizona court also failed to address the Indian canons of construction, which favor the interpretation of a statute or decree that benefits the tribe.[30] Notably, the canons of construction were recently applied to the Decree by the Ninth Circuit Court of Appeals.[31] Further,

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[26] *Compare* San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1348 (Fed. Cir. 2011) ("[A]ll of the parties to whom rights to water are decreed in this cause . . . are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein . . . —any [additional] right, title or interest in or to the waters of the Gila River . . . ."), *with Mille Lacs Band*, 526 U.S. at 195 ("[T]he said Indians do fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere.").

[27] *Mille Lacs Band*, 526 U.S. at 195.

[28] *San Carlos Apache Tribe*, 639 F.3d at 1348; *see also* Morton v. Mancari, 417 U.S. 535 (1974) (determining that broad, general language in a more recent statute did not abrogate a tribe's employment preference rights granted in a specific, albeit older statute).

[29] *See, e.g.*, Arizona v. California, 373 U.S. 546, 599 (1963).

[30] United States v. Gila Valley Irrigation Dist., 31 F.3d 1428, 1437–38 (9th Cir. 1994). Although the *Mille Lacs Band* Court applied these canons of construction to a statute, they also apply to consent decrees. *Id.* Still, even though these canons use mandatory language, the Supreme Court has, at times, inexplicably failed to apply them. *See, e.g.*, Montana v. United States, 533 U.S. 262 (2001) (determining that upon attaining statehood, Montana gained title to a river bed within tribal territory).

[31] *Gila Valley Irrigation Dist.*, 31 F.3d at 1437–38. The Ninth Circuit stated:

although canons of construction are usually only applied when resolving ambiguities,[32] they were applied in *Mille Lacs Band* despite the clarity of the treaty's plain language.[33] The type of ambiguity that permits use of the canons, therefore, is not limited to linguistic ambiguity. Indeed, the *Mille Lacs Band* Court looked "beyond the written words, to the larger context that frames the treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'"[34]

The Arizona court did consider some contextual evidence, such as the language of the United States' amended complaint in the Globe Equity proceedings,[35] but that evidence failed to resolve the Decree's situational ambiguities. In the amended complaint, the federal government referred to the Tribe's rights as "reserved and appropriated,"[36] and the Arizona court placed heavy emphasis on the word "reserved" as indicative of an intent to settle the Tribe's reserved *Winters* water rights.[37] But the vague term "reserved" only exacerbates the ambiguity of the Decree. The term "reserved" is used in the context of many tribal rights, especially those based on treaties.[38] The parties could have easily included this language to address any rights reserved under treaties.[39] Thus, the term "reserved" does not unequivocally show that the *Winters* reserved water rights were specifically considered at the time the parties entered into the Decree.

Further, the Supreme Court has held that parties who are legally competent can be expected to explicitly convey their intent and not

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> This court has recognized certain canons for interpretation of Indian treaties. "These canons call for promoting the treaties' central purposes; construing treaties as they were originally understood by the tribal representatives, rather than according to legal technicalities; resolving ambiguities in favor of the Indians; and interpreting the treaties in the Indians' favor." . . . These canons should also be applied in appropriate situations involving contracts or consent decrees between Indians and non-Indians.

Id.

[32] *See Mille Lacs Band*, 526 U.S. at 200.

[33] *Id.* at 195.

[34] *Id.* at 196.

[35] *Gila River Sys.,* 127 P.3d 882, 894 (Ariz. 2006) (en banc).

[36] *Id.* at 895.

[37] *See id.*

[38] *See, e.g.,* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 680, *modified sub nom.*, Washington v. United States, 444 U.S. 816 (1979) (addressing reserved fishing rights).

[39] Indeed, the Mille Lacs Tribe's fishing rights were also considered "reserved" rights. *Mille Lacs Band*, 526 U.S. at 195.

abrogate rights without such explicit language.[40] General language, such as the language in the Globe Equity Decree, has previously been insufficient.[41] But nowhere did the parties to the Decree use explicit language to describe and include the Tribe's water rights that were, per *Winters*, reserved during the creation of the reservation. Such language could be expected of a legally sophisticated party such as the United States. Thus, specific language should have been required for the diminishment of water rights necessary to support the reservation.[42]

A presumption of fair dealing could only have led the Arizona court to conclude that the government did not intend to diminish the Tribe's water rights. The court recognized that the "contractual nature of consent judgments has led to general agreement that preclusive effects should be measured by the intent of the parties."[43] Thus, to conclude that the Decree diminished the Tribe's water rights, the court would have had to first determine that the federal government intended to do so. But any determination that the United States actually sought to diminish the Tribe's rights would impute to the government an intent to deal unfairly with the Tribe and to deprive it of the water necessary to sustain its reservation. This conclusion would be contrary to the presumption that the government intended to deal fairly with the Indians.[44] Indeed, this presumption is the rationale behind the *Winters* doctrine: "The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless."[45]

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[40] *Id.*
[41] *See id.*
[42] The Arizona court additionally concluded that the Amended Complaint asserting that the Tribe's water rights were based on theories of "occupancy and possession" necessarily indicated that federal reserved rights were specifically under consideration. *See Gila River Sys.*, 127 P.3d at 894.
[43] *Id.* at 890 (quoting 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4443 (1981)).
[44] *See, e.g.,* Pittsburg & Midway Coal Min. Co. v. Yazzie, 909 F.2d 1387, 1395 (10th Cir. 1990) (applying the presumption of fair dealings in the context of land allotments); Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Sec'y of Commerce, 494 F. Supp. 626, 633 (N.D. Cal. 1980) ("[I]t must always be presumed that Congress 'intended to deal fairly with the Indians.'" (quoting Arizona v. California, 373 U.S. 546, 600 (1963))). *But see* Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903) (presuming that "Congress acted in perfect good faith in the dealings with the Indians" and refusing to further scrutinize the government's allegedly fraudulent dealings with a tribe).
[45] Arizona v. California, 373 U.S. at 600.

Finally, the Globe Equity proceedings showed that the United States District Court for the District of Arizona,[46] the court that entered the Decree, did not intend to abrogate the Tribe's *Winters* water rights. In issuing the Decree, the District Court characterized the Tribe as "warlike and in no sense agrarian."[47] Even if this rationalization had been a permissible characterization of the entire Apache culture, it was irrelevant to the determination of federal reserved water rights under the *Winters* doctrine.[48] In the *Winters* case, the Court awarded reserved water rights even though it determined that the tribe in that case was "a nomadic and uncivilized people."[49] The *Winters* Court instead emphasized that the intent of the legislature in creating reservations was "to change those habits" and to make the tribe "a pastoral and civilized people."[50] Thus, the focus of the *Winters* doctrine is on future use, not the tribe's past. Indeed, the Supreme Court later confirmed that *Winters* water rights are "intended to satisfy future as well as the present need of the Indian Reservations."[51] Even if the Apache tribe had been "warlike," their historical culture was irrelevant to the determination of reserved water rights.[52] The District Court's focus on the culture of the Apache people indicates that the court decided the Tribe's rights in the Decree without addressing the rationale behind reserved water rights, and thus left the Tribe's *Winters* rights intact.

B. The Effect of the Decree

The second issue addressed by the Arizona court was whether the Decree had a binding effect on the Tribe under the principle of res judicata.[53] The Tribe was not a party to the proceedings of the Decree, and a nonparty is only bound to a judgment if the nonparty was in privity

[46] The United States District Court for the District of Arizona is hereinafter referred to as "the District Court."
[47] San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1356 (Fed. Cir. 2011) (Newman, J., dissenting).
[48] *See* Winters v. United States, 207 U.S. 564, 576 (1908).
[49] *Id.*
[50] *Id.*
[51] *Arizona v. California*, 373 U.S. at 600. Accordingly, the Court determined that *Winters* water rights should be determined by the irrigable acreage of the reservation. *Id.* at 600–01.
[52] *Winters*, 207 U.S. at 576. Indeed, a tribe's "warlike" culture would only have strengthened the legislature's resolve to "change those habits" by creating a reservation for "pastoral" activities that required water. To effectuate this intent, Congress would have impliedly reserved water rights for the reservation to permit agriculture as an alternative to previous occupations.
[53] *Gila River Sys.,* 127 P.3d 882, 896 (Ariz. 2006) (en banc).

with a party that adequately represented its interests in the judgment.[54] This privity requirement protects a party's constitutional right to due process.[55] Without privity, a party would be bound to a past judgment without an opportunity to be heard, in violation of the Fourteenth Amendment.[56]

The Tribe argued that it was not bound by the Decree because it was not in privity with the United States, who had acted as the Tribe's representative in the Globe Equity proceedings.[57] Specifically, the Tribe argued that the federal government did not adequately represent the Tribe's interest[58] because the United States had significant conflicts of interest when representing the Tribe and ultimately failing to preserve tribal water rights under the Decree.[59] Thus, the Decree would not bind the Tribe under res judicata because the United States did not adequately represent the Tribe's interests in the first proceeding, which prevented the element of privity from being met.[60]

But the Arizona court refused to address the issue of privity and res judicata.[61] The court stated that the doctrine of comity required that it defer to the federal court that issued the Decree.[62] Even though the District Court that issued the Decree had not addressed whether the Tribe was bound to the Decree, the Arizona court nevertheless reasoned that the federal court would have likely determined that the Decree was binding on the Tribe.[63] The court concluded that it should thus defer to the federal court and decline to decide whether the United States' representation of the Tribe was so inadequate as to preclude privity.[64] In effect, the Arizona

[54] *Id.*
[55] Richards v. Jefferson County, 517 U.S. 793, 797–98, n.4 (1996) ("[A] State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.").
[56] *Id.*
[57] *Gila River Sys.*, 127 P.3d at 897.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 899.
[62] *Id.*
[63] *Id.* at 900.
[64] *Id.* at 901.

court only partially applied the doctrine of res judicata; it applied the elements of res judicata that were met but omitted privity, the element that was primarily in question.

The Arizona court erred for three reasons. First, its use of comity to avoid the privity requirement of res judicata violated the Tribe's constitutional right to due process. Second, the Arizona court misapplied the doctrine of comity as previously defined by the Arizona State and United States Supreme Courts. Finally, the Arizona court's approach whipsawed the Tribe by refusing to hear the Tribe's arguments while deferring to a court that had also refused to hear the Tribe's case. In result, no court ever decided whether the Tribe was actually in privity with the United States; no proceeding ever truly gave the Tribe its day in court.

1. Denial of Due Process

Binding a nonparty to a prior judgment risks depriving that party of an opportunity to be heard unless it was represented in the earlier proceeding.[65] Thus, a state violates the Due Process Clause of the Fourteenth Amendment when it gives conclusive effect to a prior judgment against one who was neither a party nor in privity with a party therein.[66] But when the Tribe argued that there was no privity between it and the United States, the Arizona court decided that "we need not resolve that issue . . . because we conclude that the doctrine of comity compels us to refrain from addressing the Tribe's arguments."[67] Thus, the Arizona court placed the doctrine of comity over the Tribe's due process rights.

The Arizona Supreme Court erred by placing comity above the right to due process. Courts agree that a violation of a party's due process rights precludes application of comity.[68] The Arizona court rationalized its disregard for the Tribe's due process by suggesting that the inadequate representation exception[69] would not have been available to the Tribe in federal court, rendering the issue moot. Specifically, the court stated that the United States Supreme Court "has never held that the government's

[65] Mathews v. Eldridge, 424 U.S. 319, 333 (1976); *see also* Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008).
[66] *See, e.g.,* Richards v. Jefferson County, 517 U.S. 793, 797–98, n.4 (1996).
[67] *Gila River Sys.*, 127 P.3d at 898.
[68] *See, e.g.,* Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1152 (9th Cir. 2001) (violation of due process in tribal court precluded application of comity doctrine to tribal court's judgment).
[69] *See* discussion *supra* Part I.B.

representation of a tribe can be so inadequate as to prevent privity."[70] This rationalization could be interpreted in two ways.

First, the Arizona court may be arguing that the Supreme Court would not even recognize an exception to res judicata based on inadequate representation, meaning that a federal court would not apply that exception to the Tribe's case. But the Supreme Court has already explicitly recognized such an exception on numerous occasions.[71] In *Richards*, the Court articulated that a nonparty is bound to prior judgments "in certain limited circumstances" where the nonparty's "interests [are] *adequately* represented by someone with the same interests who is a party."[72] Thus, any assertion by the Arizona court that the Supreme Court would not recognize a general inadequate representation exception would be incorrect.

Alternatively, the Arizona court may have meant that although the inadequate representation exception generally protects nonparties from being bound to judgments they did not participate in, the exception does not protect Native American tribes when represented by the United States as a trustee.[73] If so, then the court discriminatorily narrowed the issue to whether an inadequate representation exception can be applied to Native Americans, even though it would have applied to other nonparties. Framing the issue in this way suggests that federal courts would apply a lower standard of due process to tribes than to other parties, and would

[70] *Gila River Sys.*, 127 P.3d at 898.
[71] *E.g.*, *Richards*, 517 U.S. at 798.
[72] *Id.* (quoting Martin v. Wilks, 490 U.S. 755, 762 (1989)) (emphasis added). Further, in a discussion of the constitutional limitations on the privity element of res judicata, the Court favorably cited a section of the Restatement (Second) of Judgments that recognized the inadequate representation exception. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS, ch. 4 (1980)).
[73] Although the Arizona court identified Supreme Court precedent where tribes represented by the United States could not rely upon the inadequate representation exception, the Arizona court did not address the implication of the Court's consideration of the inadequate representation in tribal cases: that the exception was available to tribes under the right set of facts. *See Gila River Sys.*, 127 P.3d at 898 (quoting Arizona v. California, 460 U.S. 605, 628 (1983)). Moreover, the Court limited the determination that the inadequate representation was not met to the facts of those cases; the Court stated "a claim of inadequate representation cannot be supported *on this record*." *Arizona v. California,* 460 U.S. at 628 (emphasis added). Therefore, the Arizona court's suggestion that a tribe could never establish the inadequate representation exception was inaccurate.

thus make it easier to bind tribes, as opposed to other parties, to judgments of proceedings to which they were never a party.[74]

Not only was the court's analysis discriminatory against tribes, but it was also contrary to precedent from the Ninth Circuit Court of Appeals.[75] The Ninth Circuit has specifically recognized that inadequate representation may prevent a decree from binding a tribe: "When the government breaches its trust to the Tribes while openly advancing its own interest the Tribe is not necessarily bound."[76] The Ninth Circuit explained that "[w]here the representative's management of the litigation is so grossly deficient as to be apparent to the opposing party, it likewise creates no justifiable reliance interest in the adjudication on the part of the opposing party."[77] Because federal precedent recognizes an inadequate representation exception for both tribes and other nonparties, the Arizona Supreme Court could not have realistically assumed that the issuing

[74] Sadly, such differential treatment under the Constitution is not without precedent. *See, e.g.,* Luralene D. Tapahe, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshippers*, 24 N.M. L. REV. 331, 348 (1994) ("Unlike a non-Indian religion claim under First Amendment analysis, there is an element of discrimination in the courts' treatment of Indian free exercise claims."). For example, unlike other racial classifications, classifications that turn on Native American status do not constitute racial bias or merit strict scrutiny under the Equal Protection Clause of the Fifth Amendment. Morton v. Mancari, 417 U.S. 535, 543 (1974). The Court rationalized this approach by describing "Indian" as a political status, not a racial one, even when Native American ancestry is required to establish the status. *Id. But see* Rice v. Cayetano, 528 U.S. 495, 511 (2000) (finding a violation of the Fifth Amendment when only native Hawaiians were given the right to vote in an election of a state political official and when the classification turned on the Hawaiian ancestry of the voter). The discriminatory treatment of Native Americans by the Supreme Court has led some scholars to conclude that "[f]ederal Indian law as practiced before the Supreme Court is in serious normative decline." Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 580 (2008). This normative decline "most likely began to degenerate around the time of the ascension of Chief Justice Rehnquist in 1986 and the concomitant trend toward reducing the Supreme Court's docket." *Id.*

[75] The job of the Arizona Supreme Court, as it recognized, was to give the same effect to the judgment that the court entering into the decree would give it. *Gila River Sys.*, 127 P.3d at 901. The District Court, which issued the Decree, would have been bound by both Ninth Circuit and Supreme Court precedent. Thus, the Arizona court should have considered Ninth Circuit and Supreme Court precedent in determining what effect the District Court would have given the Decree.

[76] United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1307 (9th Cir. 1981), *amended sub nom.*, United States v. Truckee-Carson Irrigation Dist., 666 F.2d 351 (9th Cir. 1982), *aff'd in part, rev'd in part sub nom.*, Nevada v. United States, 463 U.S. 110 (1983) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 86 cmt. f (1980)).

[77] *Id.*

District Court or another federal court would not have recognized such an exception to the privity element.

2. Creatively Distorting the Doctrine of Comity

In addition to denying the Tribe its right to due process, the Arizona Supreme Court also misapplied the doctrine of comity. The court stated that "the principle [of comity] is that a court should not assume to disturb another court's disposition of a controversy unless there are good reasons for doing so."[78] But this statement of the doctrine of comity departed from the Arizona court's longstanding definition of comity, which provided that "the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction."[79] While the traditional definition of comity focused on the decisions of a jurisdiction, the Arizona court's new definition of comity focused on the disposition of a specific court.

The Arizona court's new definition of comity allowed it to give effect to only the decisions of the District Court while avoiding precedent that would have required application of an inadequate representation exception. By applying a doctrine of comity that focused narrowly on a specific court, the Arizona court was able to disregard Ninth Circuit precedent that, if applied, would not bind the Tribe to a judgment from a proceeding in which it had been inadequately represented.[80] In contrast, the traditional definition of comity would have required that the court give effect to the Ninth Circuit's application of the exception to res judicata.

Although the Arizona court purported "to accord the Decree the same preclusive effect as would the issuing federal court,"[81] the court in actuality used the doctrine of comity to give the Decree greater effect than it could have been given by the issuing District Court under federal law. The District Court would have been bound to the federal doctrine of res

[78] *Gila River Sys.*, 127 P.3d at 899 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 78 cmt. a (1980)) (alterations in original).
[79] Tracy v. Super. Ct. of Maricopa County, 810 P.2d 1030, 1041 (Ariz. 1991) (giving effect to law of Navajo Nation compelling attendance of a witness in the District Court of Navajo Nation); Application of Macartney, 786 P.2d 967, 970 (Ariz. 1990) (giving effect to the detailed findings in a Nevada Supreme Court case that an unaccredited ABA school provided a substantially equivalent education to an accredited school, thus allowing petitioners from the unaccredited school to sit for the Arizona state bar examination).
[80] *Truckee-Carson Irrigation Dist.*, 649 F.2d at 1303–06.
[81] *Gila River Sys.*, 127 P.3d at 901.

judicata, which includes an exception for inadequate representation.[82] Unlike the Arizona court, the District Court could not have avoided the inadequate representation analysis.

The Arizona court's narrow formulation of comity was inconsistent with the intent of the District Court that issued the Decree. The District Court intended for the Tribe's "federal rights . . . to be determined under federal law."[83] But the court's new formulation of the doctrine of comity essentially applied only federal law from the issuing jurisdiction. In effect, the Arizona court purported to defer to the District Court while simultaneously avoiding the very law that the District Court intended to apply.

The Arizona court also inconsistently applied its new formulation of the doctrine of comity. The court's new definition of comity only allowed it to respect the "dispositions" of another court.[84] The legal definition of "disposition" is "the final settlement of a matter" or the "judge's ruling . . . regardless of [the] level of resolution."[85] Although the Globe

[82] Richards v. Jefferson County, 517 U.S. 793, 798 (1996); *Truckee-Carson Irrigation Dist.*, 649 F.2d at 1303–06.

[83] *In re* Matter of Determination of Conflicting Rights to Use of Water from Salt River Above Granite Reef Dam, 484 F. Supp. 778, 779 (D. Ariz. 1980), *rev'd sub nom.*, San Carlos Apache Tribe of Ariz. v. Arizona, 668 F.2d 1093 (9th Cir. 1982), *rev'd sub nom.*, Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545 (1983).

[84] *Gila River Sys.*, 127 P.3d at 899 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 78 cmt. a (1980)).

[85] BLACK'S LAW DICTIONARY 471 (6th ed. 1991) (citing W. Line Consol. Sch. Dist. v. Cont'l Cas. Co., 632 F. Supp. 295, 303 (N.D. Miss. 1986)). This definition applies "to decisions announced by [a] court." *Id.* But when used "[w]ith respect to a mental state," the term "disposition" may also mean ""prevailing tendency, mood, or inclination." *Id.* Thus, the Arizona court may have used this latter definition from the comments of the Restatement because the term "disposition" was more malleable than the terms "laws or decisions." Indeed, the terms "laws or decisions" had been narrowly interpreted to mean the specific holdings of a court. John Arai Mitchell, *A World Without Tribes? Tribal Rights of Self-Government and the Enforcement of State Court Orders in Indian Country*, 61 U. CHI. L. REV. 707, 719–20 (1994) (citing Brown v. Babbitt Ford, Inc., 571 P.2d 689, 695 (Ariz. Ct. App. 1977)). Because the Arizona court had not made any "decision" or holding about the binding effect of the Decree on the Tribe, the traditional definition of comity would not have supported the Arizona court's analysis. But the ambiguity of the term "disposition" may have allowed the Arizona court to give effect to any "mood" of the District Court or "tendency" to uphold the Decree. Even though the District Court judge would have had to follow Ninth Circuit precedent regarding the inadequate representation exception, the Arizona court avoided it by giving deference not to how the District Court judge actually would decide the issue, but instead to the judge's "attitude" toward the issue. It is doubtful

Equity Decree was a "final settlement" and "ruling," the District Court had made no such final ruling regarding the Decree's application or binding effect on the San Carlos Apache Tribe. The Arizona court only pointed out that the District Court had "intimated its view of a tribe's ability to challenge both the validity of the Decree and the adequacy of the United States' representation in the Globe Equity Decree."[86] But intimating a view can hardly constitute a "final settlement" or "ruling" for the purposes of comity under the Arizona court's formulation.

Further, even if these intimated views could be considered a court's "disposition," such a view was still never applied to the Tribe's rights specifically.[87] Rather, the District Court had prevented a different tribe, the Gila River Indian Community (GRIC), from vacating the Decree in full.[88] But the GRIC was only an intervenor, not an original party, in the previous litigation,[89] and so the court had broad discretion to limit the GRIC's intervention to particular issues or for limited purposes.[90] Indeed, the court may have limited the GRIC's intervention out of deference to the interests of the main parties in that litigation who might have been prejudiced by a costly broadening of the scope of the litigation.[91] Thus, the court's discretionary denial of the GRIC's arguments did not reflect how the court would have determined the merits of the Tribe's argument that it was not bound by the Decree.

The issue addressed by the District Court with regard to the GRIC was not only procedurally different, but also substantively different from the arguments made by the San Carlos Apache Tribe before the Arizona Supreme Court. Unlike the GRIC, the Tribe did not try to vacate the entire Decree.[92] The Tribe merely sought to avoid the binding effect of the

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that the doctrine of comity can be stretched this far to give legal effect to the whims of judges, unbounded by precedent or law, without violating due process.

[86] *Gila River Sys.*, 127 P.3d at 900.

[87] *Id.*

[88] *Id.*

[89] *See id.*

[90] Ctr. for Biological Diversity v. Brennan, 571 F. Supp. 2d 1105, 1130 (N.D. Cal. 2007); MARY K. KANE, CONDITIONS ON INTERVENTION, 7C FED. PRAC. & PROC. CIV. § 1922 (3d ed. 2011) (noting that courts have discretion to limit permissive intervention and that some courts have even limited interventions as of right).

[91] *See, e.g.,* Ionian Shipping Co. v. British Law Ins. Co., 426 F.2d 186, 191–92 (2d Cir. 1970) (permitting court to impose on intervenors any conditions "necessary to efficient conduct of the proceedings" (internal quotation marks omitted)).

[92] United States v. Williams, 904 F.2d 7, 8 (7th Cir. 1990). The effect of vacating a judgment "is to nullify the judgment entirely and place the parties in the position of no trial

Decree on it as a nonparty to the judgment.[93] Granting the Tribe's argument would not have had the far-reaching implications sought by the GRIC;[94] it would not have precluded enforcement of the Decree against other parties that were adequately represented in that litigation. Parties to a judgment are still bound by the judgment, even if the judgment has no res judicata effects on a nonparty.[95] Accordingly, the District Court would not have had to vacate the Decree in full to determine that the Tribe was not bound by it. The District Court's prior rejection of a sweeping argument to vacate the Decree does not demonstrate that it would deny a nonparty relief from the Decree upon a showing that all elements of res judicata were not met.

Additionally, the District Court's rejection of claims by the GRIC of inadequate representation is not applicable to the same arguments made by the San Carlos Apache Tribe before the Arizona Supreme Court. In refusing to hear the GRIC's argument that it had been inadequately represented by the United States,[96] the District Court merely expressed its views regarding the inadequate representation arguments made by the GRIC, not the San Carlos Apache Tribe.[97] The court's view of a different tribe's ability to avail itself of the inadequate representation exception can hardly be considered dispositive of whether the federal government's representation of the Tribe was adequate. While the GRIC obtained 210,000 acre–feet of water under the Decree, the San Carlos Apache Tribe obtained only 6,000.[98] Any court would have been understandably

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having taken place at all; thus, a vacated judgment is of no further force or effect." *Id.* (citations omitted).

[93] The logical result of this argument would seem to require a constructive vacating of the Decree after application of the exception to the other tribal parties to the Decree. But the representation given the Tribe by the federal government was qualitatively different than representation received by other tribal parties, rendering such applications difficult. *See infra* II.B.2.

[94] *See, e.g.,* Jones v. Mendocino County Narcotic Task Force, 895 F.2d 1417 (9th Cir. 1990).

[95] *See id.*; *see also* CHARLES ALAN WRIGHT ET AL., PARTIES BOUND—BASIC PRINCIPLES, 18A FED. PRAC. & PROC. JURIS. § 4449 (2d ed. 2011) ("The basic premise of preclusion is that parties to a prior action are bound and nonparties are not bound.").

[96] Gila River Sys., 127 P.3d 882, 900 (Ariz. 2006) (en banc). The District Court had stated that "it was 'too late in the day for GRIC now to complain of its representation back in 1935.'" *Id.* But this rationale for denying the GRIC's argument focuses on the timing of the complaint, and is specific to the GRIC, not the San Carlos Apache Tribe.

[97] *Id.*

[98] San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1357 (Fed. Cir. 2011) (Newman, J., dissenting).

less receptive to an inadequate representation claim from the GRIC, whose substantial water rights dwarf those received by the San Carlos Apache Tribe under the same Decree. A claim by the GRIC that it had received inadequate representation would have been seen as opportunistic because the tribe already received significant water rights. In contrast, the United States' reservation of only 6,000 acre–feet for the San Carlos Apache Tribe would have made it much more likely for the Tribe to succeed on its claim that it had indeed been inadequately represented.

The historical relationships between the United States and different tribes increased the likelihood that the government represented the GRIC more vigorously than the San Carlos Apache Tribe during the Globe Equity proceedings. The unequal treatment of the two tribes in the Decree was based in part on historical differences between the tribes' relations with the United States. Namely, the GRIC were viewed as "an industrious farming race[, while] the Apache are and always have been warlike and in no sense agrarian."[99] The GRIC also did not have any military conflicts with the United States, while the Apache tribe clashed with the United States Army several times.[100] Indeed, the San Carlos Reservation was seen as "an alternative to genocide as a method of getting rid of the Apache."[101] And even after the violence between the Apache and settlers ended, locals still "had a vital interest in the Apache's remaining a threat" in order limit the Tribe's ability to compete with local merchants.[102]

The differential treatment of the GRIC and the San Carlos Apache Tribe under the Decree supports the conclusion that the tribes received differential representation during its creation. The San Carlos Apache Tribe received no water storage rights from the San Carlos Project, even though the reservoir created by the project was located on the San Carlos

[99] *Id.* at 1356.
[100] *See generally* KARL JACOBY, SHADOWS AT DAWN: AN APACHE MASSACRE AND THE VIOLENCE OF HISTORY (2009). *See also* JOHN GREGORY BOURKE, ON THE BORDER WITH CROOK 127 (1971) ("The Apache was a hard foe to subdue, not because he was full of wiles and tricks and experienced in all that pertains to the arts of way, but because he had so few artificial wants and depended almost absolutely upon what his great mother—Nature—stood ready to supply."); GREGORY MCNAMEE, GILA: THE LIFE AND DEATH OF AN AMERICAN RIVER 104–05 (1998).
[101] RICHARD J. PERRY, APACHE RESERVATION: INDIGENOUS PEOPLES AND THE AMERICAN STATE 121 (1993).
[102] The military "bought supplies from [the Apaches] rather than from Anglo-American contractors, who in the past often had struck comfortable deals with purchasing agents." *Id.*

Apache Reservation.[103] In contrast, the GRIC was one of the main beneficiaries of the project and received substantial water storage rights under the Decree.[104] This differential treatment distinguishes the inadequate representation arguments of the two tribes, which undercuts the parallels drawn between the arguments by the Arizona Supreme Court.

Ultimately, the Arizona Supreme Court erred by redefining the traditional doctrine of comity and ignoring federal caselaw relevant to how the District Court would have treated the Tribe's claims. The Arizona court also erred in giving undue weight to the District Court's treatment of a differently situated tribe that raised different procedural issues. This legal analysis wrongfully bound the San Carlos Apache Tribe to the failed arguments of other tribes and therefore deprived the Tribe of its day in court.

3. The Federal–State Whipsaw and Wasteful Litigation

Regardless of the accuracy of the Arizona Supreme Court's comity analysis, the court's reliance on the doctrine of comity to defer to the federal courts was itself inappropriate. The federal courts had already deferred to the states by dismissing the Tribe's case in *Arizona v. San Carlos Apache Tribe*.[105] The doctrine of comity "teaches that one court should defer action . . . until the courts of another sovereignty with concurrent powers . . . *have had an opportunity to pass upon the matter*."[106] The District Court already had an opportunity to decide the Tribe's water rights under the Decree, but instead chose to dismiss the case and defer to the state court.[107] Had the District Court determined that

[103] San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860 (D. Ariz. 2003), *aff'd*, San Carlos Apache Tribe v. United States, 639 F.3d 1346 (Fed. Cir. 2011).
[104] *Id.*
[105] *See generally* Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983). *See also* discussion *supra* Part I.B.2.
[106] Rhines v. Weber, 544 U.S. 269, 274 (2005).
[107] *Arizona v. San Carlos Apache*, 463 U.S. at 550. The district court had discretion to defer to the state court or decide the case itself. *See id.* at 569–70; Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 273 ("[The McCarran Amendment] does not eliminate federal court jurisdiction over water right claims, nor does McCarran's policy (as interpreted by the Court) necessarily require federal courts to abstain in favor of state court proceedings."). *But see Arizona v. San Carlos Apache*, 463 U.S. at 578 (Stevens, J., dissenting) ("[T]he Court holds that considerations of 'wise judicial administration'

a federal forum was more appropriate than adjudication in state court, it would not have deferred.[108]

The Arizona court's application of comity was actually contrary to the will of the court to which it deferred. The District Court had already concluded that the state court was better equipped to determine the Tribe's water rights.[109] Although the District Court did not specifically pass on the issue of whether the Tribe was bound by the Decree, the purpose of its deference was to permit the state to adjudicate all water-rights claims, including those claims based on federal reserved rights.[110] Litigation regarding those water rights required a determination of whether the Decree was binding. By deferring to state courts with regard to "all water rights," the federal court necessarily deferred with regard to the issue of res judicata, as well. In effect, the courts whipsawed the Tribe by deferring to each other, each refusing to hear the Tribe's arguments.

Although the Arizona court purported to defer to the federal court, it nevertheless decided whether the Tribe was bound by the Decree without addressing the issue of privity. But if the doctrine of comity militated against addressing the privity element, it also militated against the court deciding the entire issue of res judicata.[111] Indeed, in all of the cases that the Arizona court cited to support its application of comity, the deferring

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require that Indian claims, governed by federal law, must be relegated to the state courts.").

[108] The District Court determines whether to defer to the state-court proceedings based on concerns of "wise judicial administration." Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976); *see also* WRIGHT & MILLER, AVOIDING DUPLICATIVE LITIGATION, 17A FED. PRAC. & PROC. JURIS. § 4247 (3d ed.) ("The teaching of the Colorado River case was that only 'exceptional' circumstances will permit a federal court to refrain from exercising its jurisdiction for reasons of wise judicial administration due to the presence of a concurrent state proceeding.").

[109] Matter of Determination of Conflicting Rights to Use of Water from Salt River Above Granite Reef Dam, 484 F. Supp. 778, 784 (D. Ariz. 1980), *rev'd sub nom.*, San Carlos Apache Tribe of Ariz. v. Arizona, 668 F.2d 1093 (9th Cir. 1982), *rev'd sub nom.*, Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545 (1983) (emphasizing "the intense local concern in proceedings for the determination of State water rights" and dismissing the case "for a more effective and complete determination of water rights in the State courts").

[110] *Id.* at 784. ("[T]he State proceedings will determine federal reserved water rights. . . . The only rights excluded from the State proceeding are those rights to percolating groundwater arising solely under Arizona case law.").

[111] *Cf.* Administaff, Inc. v. Kaster, 799 F. Supp. 685, 690 (W.D. Tex. 1992) (determining, for purposes of pendent jurisdiction, that remanding an entire case is preferable to dividing it or to dismissing some of a plaintiff's claims).

courts had either refused to consider the entire action or completely declined jurisdiction and remanded the parties to pursue relief in the rendering court.[112] In those cases, each deferring court's refusal to decide the overall action protected the parties' due process rights by ensuring the parties could obtain relief in the issuing court. But the Arizona court did not respect the Tribe's due process rights by remanding the issue; it instead retained jurisdiction and decided the overall issue without applying the requirement of privity. In effect, the court abandoned the federal doctrine of res judicata and replaced it with a new doctrine that only included elements unfavorable to the Tribe.

The Arizona court also improperly faulted the Tribe for not engaging in unnecessary and wasteful litigation. The Arizona court justified its refusal to address the Tribe's inadequate representation arguments by accusing the Tribe of making a "strategic choice to withhold making those arguments in the court that issued the Decree in order to seek a more favorable forum here."[113] Specifically, the court criticized the Tribe for failing to make the arguments in a 1992 federal court case.[114] The Tribe was forced to intervene to protect its water rights under the Decree when the water commissioner for Arizona impermissibly over-calculated water other users were entitled to divert from the Gila River.[115] But arguments against the enforceability of the Decree would have been wasteful and unnecessary during the 1992 litigation. No party had attacked the Tribe's ability to assert its *Winters* water rights in that litigation, nor had any court determined that the Decree diminished or abrogated the Tribe's water rights. Thus, the Tribe had no reason to assert defenses against or otherwise attempt to vacate the Decree. Further, the Tribe did not necessarily have standing to attack the Decree at that time because it was merely an intervenor in the case.[116] A preemptive attack on the Decree might have even jeopardized the Tribe's ability to intervene and protect its water rights at all.

[112] Gila River Sys., 127 P.3d 882, 899–901 (2006) (en banc) (discussing Lapin v. Shulton, Inc., 333 F.2d 169 (9th Cir.1964). *See generally* Treadaway v. Academy of Motion Picture Arts & Sciences, 783 F.2d 1418 (9th Cir.1986).
[113] *Gila River Sys.*, 127 P.3d at 901.
[114] *Id.* at 901–02.
[115] *See generally* United States v. Gila Valley Irrigation Dist., 961 F.2d 1432 (9th Cir. 1992).
[116] *Gila River Sys.*, 127 P.3d at 882, 900.

II. LEARNING FROM THE MISTAKES OF THE ARIZONA COURT

In a general sense, the story of the San Carlos Apache Tribe is not unique. The antagonism between states and tribes is a recurring theme in the history of Federal Indian Law.[117] The Arizona Supreme Court's refusal to afford the San Carlos Apache Tribe due process, as well as its unprecedented use of the doctrine of comity to deprive the Tribe of its water rights, merely echo this theme. And they validate the fear of tribes who are forced to defend their rights in state-court proceedings. Thus, perhaps the most obvious solution to the problems faced by the San Carlos Apache Tribe is one that has been frequently advocated by Indian law scholars:[118] Congress should reinstate federal oversight over claims concerning Indian reserved water rights by amending the McCarran Amendment.[119]

State courts are essentially interested parties in litigation between states and tribes, and often find ways to bend the law to meet state interests.[120] The Arizona court creatively failed to recognize the exception to res judicata based on inadequate representation even though it has been applied by the Ninth Circuit and the Supreme Court.[121] And the threat of appellate review by the Supreme Court has not been sufficient to check state aggression against Indian rights under federal law.[122] For instance, while the Court previously promised in *Arizona v. San Carlos Apache Tribe* to meet alleged state discrimination with "exacting scrutiny,"[123] it predictably denied certiorari when the Tribe sought review of the Arizona court's decision.[124] Relying on the Supreme Court's appellate

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[117] *See, e.g.,* Worcester v. Georgia, 31 U.S. 515 (1832); *see also* John P. Lavelle, *Sanctioning A Tyranny: The Diminishment of Ex Parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur D'alene Tribe*, 31 ARIZ. ST. L.J. 787, 902 (1999) (recognizing the "ignominious history of state encroachments on the sovereign rights, jurisdiction and resources of Indian Tribes").

[118] Judith V. Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RESOURCES J. 375, 389–90 (2006).

[119] 43 U.S.C. § 666 (1952).

[120] *See* Royster, *supra* note 118, at 390 ("State courts are obligated to determine tribal rights to water according to federal law. Not all state courts, however, have been scrupulous about this duty.").

[121] *See* discussion *supra* Part I.B.2.

[122] *See id.*

[123] Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983).

[124] San Carlos Apache Tribe v. Arizona, 549 U.S. 1156 (2007).*See also* Royster, *supra* note 118, at 389–91 ("Although the Supreme Court has indicated its willingness to correct abuses through a petition for certiorari, it denied review of the questions presented by the

jurisdiction to protect tribes from state discrimination is simply infeasible considering the small number of cases for which it grants certiorari.[125]

If legal precedent and appellate review are insufficient to curb state-court aggression, then tribes will turn to the lower federal courts for protection; however, this is not an option under current interpretation of the McCarran Amendment. In *Arizona v. San Carlos Apache Tribe*, the Court interpreted the McCarran Amendment to permit federal courts to dismiss actions brought by tribes and instead defer the proceedings to state courts.[126] Therefore, the current interpretation of the McCarran Amendment forces tribes to defend their rights in state courts that have traditionally been inhospitable to their rights.[127]

Some have argued that the McCarran Amendment does not constitute a major threat to tribes' federal rights.[128] Its implications are somewhat narrow, as federal courts are only able to defer to state courts under the McCarran Amendment during general adjudications of water rights in that state.[129] Thus, tribes will still have access to federal courts in many other water law cases.[130]

But there has been an increase in major water rights adjudications, so tribes have had to defend their rights in state courts with greater frequency.[131] Tribes may still be able to avoid the disadvantages of having a state court interpret their water rights by bringing declaratory actions to quantify and settle *Winters* water rights in federal court before state-court adjudications occur. But even if a tribe takes preemptive action, the McCarran Amendment still gives states the opportunity to influence, reinterpret, and redefine water rights even after a federal determination. If

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tribal party in the only state court water rights adjudication that it has considered.").

[125] Newdow v. U.S. Cong., 328 F.3d 466, 470 (9th Cir. 2003), *rev'd sub nom.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) ("While the Supreme Court unquestionably has the authority to review any or all of the decisions of the Court of Appeals, the Court has elected to hear a remarkably small number of cases in recent years.").

[126] *Arizona v. San Carlos Apache,* 463 U.S. at 571.

[127] *Id.*

[128] *See* Benson, *supra* note 107, at 274.

[129] *See id.*

[130] *See id.*

[131] *See, e.g.,* Steven J. Shupe, *Water in Indian Country: From Paper Rights to A Managed Resource*, 57 U. COLO. L. REV. 561, 592 (1986) ("A 'general stream adjudication' is a common tool used by many western states in their water administration schemes.").

a state court is willing to ignore an element of res judicata, then it is hard to imagine any obstacle, even a prior federal-court determination, that would sufficiently prevent a state from abridging tribal rights.

Accordingly, because the Supreme Court's current interpretation of the McCarran Amendment fails to protect tribes' reserved water rights, Congress should amend it to guarantee tribes a federal forum for claims based on federal water rights.[132] The statute is currently silent regarding tribal rights. The Supreme Court has nevertheless interpreted this silence to permit state courts to adjudicate tribal water rights. Thus, nothing short of an express guarantee of federal jurisdiction over tribal water rights claims will suffice to protect tribal interests from state biases and encroachment.

CONCLUSION

It is somewhat questionable whether *Winters* water rights would have actually protected the Tribe's ability to obtain water from the Gila River.[133] Indeed, courts have largely failed to enforce *Winters* water rights.[134] Perhaps the significance of the San Carlos Apache Tribe cases is not that the Tribe was deprived of its access to water—this result was likely even if the tribe was awarded *Winters* water rights because water rights are difficult to enforce against upstream users.[135] Instead, the cases serve to demonstrate the government's complicity in depriving the Tribe of water from a river that runs through its reservation. Even without government sanction, private parties would have likely accomplished this result despite the ostensible protection of legal doctrine.[136] Therefore, the

[132] Such an amendment would also harmonize the McCarran Amendment with 28 U.S.C. § 1362, which "embodies a federal promise that Indian tribes will be able to invoke the jurisdiction of federal courts to resolve matters in controversy arising under federal law." *Arizona v. San Carlos Apache*, 463 U.S. at 570–71.
[133] MCNAMEE, *supra* note 100, at 159 ("The Winters Doctrine was often cited but rarely enforced, and Indian water continued to nourish Anglo fields and sweep aside the mountains that shielded ore from miners eyes.").
[134] *Id.*
[135] Joseph M. Feller, *The Adjudication That Ate Arizona Water Law*, 49 ARIZ. L. REV. 405, 440 (2007) ("The greatest problem in surface water rights administration in Arizona today is not the lack of certainty and finality in those rights, but rather the lack of an effective mechanism to enforce them.").
[136] *See id.*

unfortunate aspect of these cases is not that they deprived the Tribe of their water rights, but rather the court's willingness to endorse a historical injustice with contemporary legal doctrine.

It is our democratic faith that is at stake in our treatment of Native Americans.[137] But the problem in the San Carlos Apache Tribe cases may simply be that our democratic faith was not tested. Rather, the courts' treatment of the San Carlos Apache Tribe bears on our faith in the judicial system, which is in many ways not subject to democratic checks. Then again, perhaps it is the democratic element present in state-court elections that threatens tribes by creating bias toward local interests. Under this interpretation, our democratic faith is indeed at stake. Tribes must be insulated from those detrimental democratic elements in states that have tempestuous and sometimes adversarial histories with tribes, which is precisely the reason that Congress gave tribes a neutral forum in the federal courts. And Congress should again support neutrality in legal proceedings by unequivocally reinstating that federal forum.

[137] "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith." Lavelle, *supra* note 117, at 795.

ALASKA NATIVES: POSSESSING INHERENT RIGHTS TO SELF-GOVERNANCE AND SELF-GOVERNING FROM TIME IMMEMORIAL TO PRESENT DAY

Kristin McCarrey*

INTRODUCTION

There have been several events in Alaska Native history that have been interpreted by some to be proof that Alaska Native Tribes, unlike other Tribes, either (1) never possessed inherent self-government powers or (2) these powers were long ago terminated. In other words, Alaska Natives have no different rights or ability to govern than any other citizen in the state of Alaska. There are several reasons for this belief: (1) Alaska Natives are different from tribal entities within the contiguous United States and this difference meant they never had governmental powers; (2) the Alaska Native Claims Settlement Act (ANCSA) of 1971[1] terminated Alaska Natives' right to their land and extinguished their aboriginal title and any self-governmental powers; (3) the Supreme Court's holding in *Alaska v. Venetie* that ANCSA land was not "Indian Country" and therefore the Alaska Native Tribe did not posses the ability to impose a tax on business activities conducted on the land meant Alaska Native Tribes have no self-government powers in Alaska;[2] and (4) Alaska Native Tribes' possession of inherent self-government powers would have monumental, and potentially society-altering, consequences for the future of the State of Alaska as a cohesive polity.[3]

If indeed it were correct that Alaska Native Tribes either did not or do not possess inherent self-governance powers, this would be a travesty for the state of Alaska and Natives as a whole. It is undisputed that even today Alaska Natives have disparately high rates of poverty, abuse, and health problems. There is compelling evidence that indigenous self-determination is the *only* policy that has had broad, positive, sustained

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[1] Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 – 1629 (1971).

[2] Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520, 532 (1998).

[3] Donald Craig Mitchell, *Alaska v. Native Village of Venetie,* 14 ALASKA L. REV. 353, 353-354 (1997).

impacts on Native poverty.[4] Ultimately, in the remote regions of Alaska it is the Alaska Native Tribes that are administering and running the villages. Instead of arguing about whether or not they have inherent rights, the state of Alaska and Congress should acknowledge their inherent powers to self-govern and work with the Alaska Native Tribes to improve conditions in ways that have proven effective: through self-governance.

This article will first address whether the Alaska Native Tribes possessed self-government powers prior to the enactment of ANCSA. Second, it will analyze what impact, if any, ANCSA had on those powers. Third, it will discuss the effect post-ANCSA federal legislation had on any self-governance powers of the Alaska Native Tribes. Finally, the article will go through an analysis of what effective self-government powers Alaska Native Tribes have in the post-*Venetie* world.

I. STATUS OF ALASKA NATIVE TRIBES' ABILITY TO SELF-GOVERN PRIOR TO THE ENACTMENT OF ANCSA

A. Indigenous Peoples' Inherent Powers of Self-Government in the Coterminous States

It has been repeatedly affirmed that Tribes located within the coterminous United States were independent, self-governing societies long before any interaction or contact with European nations.[5] Because of the Tribes' storied history of self-governance pre- and post-contact with European settlers, the United States has recognized all Tribes within the contiguous states as distinct, independent political communities capable of self-government.[6] The United States has recognized tribal powers of self-government in the Constitution, treaties, and judicial decisions.[7] These communities have long been recognized as possessing inherent powers of self-government.[8] The powers of self-government did not come from a delegation by the federal government to the Tribes, but rather are inherent.[9]

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[4] Stephen Cornell and Joseph P. Kalt, *Alaska Native Self-Government and Service Delivery: What Works, Joint Occasional Papers on Native Affairs*, No. 2003-01 (2003) *available at* http://udallcenter.org/jopna.net/. (last visited Apr. 20, 2013).
[5] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a] (2005 ed.).
[6] *E.g.,* Worcester v. Georgia, 31 U.S. 515, 559 (1832). *See also,* U.S. v. Lara, 541 U.S. 193, 204-205 (2005).
[7] COHEN, *supra* note 5
[8] United States v. Wheeler, 435 U.S. 313, 322-324 (1978).
[9] *Id.*

Federal authority is the only authority that can place limits on inherent tribal powers. This federal power is plenary.[10] This means that the federal government can choose to abrogate a treaty or limit or remove a Tribe's self-governing powers.[11] However, Congress's power is not entirely unlimited.[12] The courts have insisted upon a clear and specific expression of congressional intent to extinguish the inherent self-government powers of Tribes in the coterminous United States.[13]

There is no reason to separate out Alaska Native Tribes as somehow different or inferior to the Tribes in the rest of the United States. Alaska Native Tribes had existed self-sufficiently for hundreds of years prior to any European contact and are entitled to the same presumption of possessing inherent powers of self-governance as long as the federal government has not acted to abrogate those powers.

B. Did the Federal Government Clearly Express the Intent to Extinguish the Self-Government Powers Prior to Enactment of ANCSA?

For many decades it was believed that the federal government did not initially deal with Alaska Native Tribes as it had the Native communities in the contiguous United States.[14] However, treating differently does not mean that the Alaska Native Tribes did not possess inherent self-governance powers. In the 1867 Treaty of Cession (the treaty commemorating the United States' purchase of Alaska from Russia), article III created a distinction between the uncivilized Tribes and the other inhabitants of the ceded territory. The uncivilized Tribes were subject to "laws and regulations as the United States may from time to time adopt."[15] The Treaty stated everyone else was to have the enjoyment of all rights,

[10] Lone Wolfe v. Hitchcock, 187 U.S. 553, 565-66, (1903).
[11] CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 79-80 (1987).
[12] Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84-85 (1977) (affirmed a standard of review for judging Congress's actions should not be disturbed "(a)s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians.").
[13] *E.g.,* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999). *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); *See also* Bryan v. Itasca, 426 U.S. 373 (1976).
[14] DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS 6-11 2ND ED. 2002.
[15] Treaty of Cession, U.S. – Russ., art. III, March 30, 1867, 15 Stat. 539.

advantages, and immunities of citizens of the United States.[16] The argument is that, due to Alaska Native Tribes being labeled as "uncivilized," the federal government neither recognized that the Alaska Native Tribe possessed any form of self-rule or attributes of an independent political community nor intended to apply the body of federal Indian law to Alaska.

The 1st Organic Act[17] and the 2nd Organic Territorial Act[18] established a civil government for Alaska and applied the laws to all citizens.[19] Both acts also identified that Congress had considered the Alaska Native Tribes because the acts explicitly mentioned that Natives or other persons in the district should not be disturbed in the possession of any lands actually in their use or occupation. It was generally assumed that these acts equated Native possession with non-Native possession and entitled Alaska Natives only to land that was in their individual and actual use and occupancy. The Solicitor for the Department of the Interior held initially that Alaska Natives did not have the same relationship to the federal government as other Native Americans.[20] The assumption relied upon was that if Alaska Native Tribes were treated as both uncivilized and fully subject to all the same laws of the territory as non-Native Alaskans, the federal government had never recognized them as independent communities who were able to self-govern.[21]

Whether or not the Alaska Natives Tribes were treated as being subject to Alaska Territorial jurisdiction does not resolve the question of whether or not the same people still possessed inherent ability to self-govern. Second, none of these acts explicitly addressed the issue of whether or not the Alaska Native Tribes had inherent powers or made a clear and explicit statement of Congress's intent to divest the Alaska Native Tribes of their inherent self-governance powers.[22]

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[16] *Id.*
[17] Organic Act of 1884, §8, 23 Stat. 24, 26.
[18] Organic Territorial Act of August 24, 1912, Pub. L. No. 334, 37 Stat. 512.
[19] Citizens included the Alaska Native Tribes at that time.
[20] DAVID S. CASE & DAVID A. VOLUCK, ALASKA NATIVES AND AMERICAN LAWS, (2ND ED. 2002) (Citing, Alaska-Legal Status of Natives, 19 L.D. 323 (1894)).
[21] Donald Craig Mitchell, *Alaska v. Native Village of Venetie,* 14 ALASKA L. REV. 353, 355-363 (1997) (discussing that federal government policy towards Alaska Natives was fundamentally different than with other Tribes, and because of this fundamental difference Tribes never possessed inherent self-government powers.).
[22] During this time the majority of Natives could exist without encountering the non-Natives and due to the lack of interaction between them and the non-Natives there would

In addition, it was easy for the Solicitor of the Department of the Interior and others to assert that Alaska Native Tribes were not the same as the Tribes in the lower 48 when there was very little interaction between the two groups and outside knowledge of Alaska Natives Tribes was limited. The reality was that Alaska was a very sparsely populated land with approximately 365 million acres of land and a population, according to the 1880 census, of 36,000 – of which 430 were not Native Alaskan. The federal government formed the Treaty with Russia and passed all of the early legislation when Natives far outnumbered non-Natives and there was limited interaction between the two populations. It was relatively simple for the federal government to say that Alaska Native Tribes had only western possession of land when no non-Natives were attempting to acquire land for their own purposes. The true intent of the federal government as to the application of the body of federal Indian law to Alaska Native Tribes would be revealed when interaction between Alaska Native Tribes and non-Natives increased.

Any doubt that the federal government had the same unique relationship with the Alaska Native Tribes as with Natives in the coterminous United States was eliminated by the courts, administrative actions, and explicit inclusion of Alaska Native Tribes within legislation created for the benefit of Tribes in the contiguous United States. It started in *United States. v. Berrigan,* where the court held that the United States had the right and the duty to file suit to prevent non-Natives from acquiring lands occupied by Natives.[23] It continued in 1931 when responsibility of the administration of Alaska Native affairs was transferred from the Bureau of Education to the Bureau of Indian Affairs.[24] This action put Alaska Native Tribes on the same footing as Tribes in the coterminous states. Then, in 1934, the Indian Reorganization Act was applied to Alaska.[25] The Indian Reorganization Act, in important part, permitted Native communities to organize their governments under federally approved constitutions and to establish federally chartered businesses or cooperatives. The inclusion of Alaska Native Tribes in this legislation was

have been no need for the federal government to legislate with the differences of their cultures in mind.

[23] U.S. v. Berrigan, 2 Alaska Rpts. 442 (D. Alaska 1904) (US brought suit to prevent non-Natives from trespassing and obtaining Native land, court held Alaska Natives Tribes were wards of the government.).

[24] Secretarial Order 494, March 14, 1931.

[25] Act of May 1, 1936, 49 Stat. 120, 25 U.S.C. § 473a.

an express acknowledgment by the federal government that the Alaska Native Tribes had self-governance powers.

Finally, several court cases upheld that Alaska Native Tribes had the same relationship with the federal government and possessed the same inherent powers as other Tribes. In *Tee-Hit-Ton Indians v. United States*, the Supreme Court ruled that the Organic Act preserved aboriginal title for later disposition and that the taking of Tongass National Forest trees did not require compensation because Alaska Native Tribes are treated the same as Tribes in the contiguous states and subject to full plenary power of Congress, such that the taking of the Tongass National Forest did not constitute a taking for Fifth Amendment purposes.[26]

Prior to ANCSA, there was no clear expression of congressional intent to terminate self-governance powers of Alaska Native Tribes. The federal government and the courts affirmed that the same relationship existed between Alaska Native Tribes and the federal government as between the federal government and the Tribes in the contiguous states. This relationship is predicated upon the premise that Tribes possess inherent self-governance powers. Because there was no clear expression of intent to terminate the self-governance powers, prior to the enactment of ANCSA, the Alaska Native Tribes possessed these inherent powers of self-government.

II. DID THE ANCSA TERMINATE ALASKA NATIVE TRIBES' INHERENT POWERS OF SELF-GOVERNMENT?

A. The Formation of ANCSA

It is entirely probable that, even though the Alaska Statehood Act of 1958 left all right or title to Native land undisturbed, Alaska Native Tribes' land claims[27] would have been ignored if not for the organizations of the Natives. The Alaska Statehood Act said

> "all right and title…to any lands or other property, the right or title to which may be held by any Indians, Eskimos, or Aleuts… or is held by the United States in trust for said

[26] Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).
[27] Alaska Natives unsettled claims made up more than 90% the geographic area of the state. *See generally*, MARY CLAY BERRY, THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS 6 (1975).

> natives… shall be and remain under absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as Congress has prescribed or may hereafter prescribe."[28]

Essentially the Act preserved the land claims of the Alaska Native Tribes and left control over the land claims of the Tribes to the federal government. Included within the act was permission for the state of Alaska to select 102.5 million acres for its own use from "vacant" public lands.[29]

Immediately after achieving statehood in 1959, Alaska started to select its 102.5 million acres. Native groups started protesting to the Secretary of the Interior that the lands were neither vacant, nor public.[30] This ramped up protests from Native groups, particularly the newly formed Alaska Federation of Natives (AFN).[31] Contemporaneously, energy companies were buying land leases for oil exploration, putting more pressure on resolving land claims.[32] The conflict between the Natives and the State led to the Secretary of the Interior suspending approval of state land selection. An effort by the State of Alaska to set aside the land freeze was rejected by the Ninth Circuit in *Alaska v. Udall*.[33]

Ultimately, the land selection freeze for the State progressed to a "freeze on further patenting or approval of applications for public lands in Alaska pending the settlement of Native claims."[34] In other words, no

[28] Alaska Statehood Act, Pub. L. No 85-108, 72 Stat. 339 (1958).
[29] Alaska Statehood Act, Pub. L. No. 85-508, § 6(b), 72 Stat. 339.
[30] Robert T. Anderson, *Alaska Native Rights, Statehood, And Unfinished Business*, 43 TULSA L. REV. 17 (2007) (Alaska Native Tribes were very concerned that if they did not act the state would pick all the land without regard to them and they would have no access to any land).
[31] Alaska Federation of Natives was formed with the express goal of seeking a land claims settlement from Congress. AFN formed a resolution that urged the Department of the interior to remove all lands in dispute form state of Alaska land selections. *E.g.*, DONALD CRAIG MITCHELL, TAKE MY LAND TAKE MY LIFE 11-81 (2001).
[32] MARY CLAY BERRY, THE ALASKA PIPELINE 123, 163-214 (1975) (Energy companies were particularly able to put pressure upon the State of Alaska because without the profits from the sale of land patents the state had very few financial resources).
[33] State of Alaska v. Udall, 420 F.2d 938, 940 (9th Cir. 1969) (State filed to compel Secretary of the Interior to issue patents to land and grant approval to state of Alaska for land selection, court held genuine issue of material fact as to whether Indian camping, hunting, trapping made the lands vacant).
[34] Pub. Land Order No. 4582, 34 Fed. Reg. 1025 (1969).

entity could select any land for any development until the land claims were resolved.

Juxtaposed with this enormous pressure from the State of Alaska, and business interests brought by energy companies who wanted to develop oil in Alaska, were the Alaska Native Tribes. During the same time period, the 1960s, the majority of Alaska Natives were unemployed or only seasonally employed, and most of them lived in poverty, had limited education, and English was not their primary language.[35] Despite this power and resource imbalance between the groups, Alaska Native Tribes managed to make their voices heard such that Congress held hearings on the Alaska Native land controversy from 1968 – 1970 in Alaska.

Even though Alaska Native Tribes did not have a vote or a veto as to the terms of the settlement of their land claims, some of the concessions that they sought were included in ANCSA.[36] Although not all of the Alaska Native Tribes' wishes were reflected in ANCSA, they sought to keep at least a portion of their land, monetary compensation for the land taken from them, and protection for traditional hunting, fishing, and gathering activities. In addition, they wanted self-determination through Native management of the lands reserved for them and Native representation in decisions affecting federally managed lands. Overall, the Natives wanted a choice to lead their lives in either their traditional way or some abridged version.[37]

B. Structure of ANCSA

ANCSA was passed by Congress on December 18, 1971.[38] It accomplished the oil companies and State of Alaska's goal of extinguishing aboriginal title of the tribal villages to the 365 million acres. In pertinent part it stated, "[a]ll aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including

[35] Federal Field Committee for Development Planning in Alaska, Alaska Natives & The Land, 1968, 12-13.
[36] Anderson, *supra* note 30, at 32.
[37] Alaska Native Land Claims Part II, Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives, Ninety-First Congress First Session on H.R. 13142, H.R. 10193. *See also*, H.R. 14212, Bills to Provide for the Settlement of Certain Land Claims of Alaska Natives, and for Other Purposes. U.S. Government Printing Office, 1970. (statement of Hon. Willie Hensley, a Representative in the Alaska Legislature form the 17th district, Kotzebue, Alaska).
[38] 43 U.S.C. § 1601.

submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist are hereby extinguished."[39] In exchange for the extinguishment of their aboriginal title, Congress created a complex mechanism for Native selection of some lands and distribution of $962.5 million.[40] ANCSA departed course from the usual method of vesting existing tribal governments with the assets from the extinguishment of title.[41]

Natives alive on December 18, 1971, were permitted to enroll and be issued stock in both one of the thirteen regional corporations and one of the more than two hundred village corporations.[42] All but the thirteenth corporation received land and money; the thirteenth corporation, which was comprised of Natives residing outside of Alaska, only received money.[43] Corporations were delegated the task of selecting lands for their own use in twelve geographic regions and in the vicinity of Native villages. Plus, the newly formed corporations had to administer their portion of the Alaska Native Fund, including distributing funds to Native shareholders. ANCSA authorized distribution of the entire $962.5 million[44] from the Alaska Native Fund to Native corporations.[45] One of the most controversial provisions, at least in spawning litigation, was the intricate revenue sharing provisions that required each landowning regional corporation to pay the other eleven regional corporations a percentage of revenue received from subsurface resources and from regional corporation timber sales.[46]

[39] 43 U.S.C. §1603(b).
[40] *E.g.,* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW, 79-80 (1987).
[41] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 4.07[3]b (2005 ed.).
[42] 43 U.S.C. §1604.
[43] 43 U.S.C. §1606(c).
[44] It has been said that this monetary amount was unprecedented. *E.g.*, James D Linxwiler, *The Alaska Native Claims Settlement Act: The First 20 Years*, 38 RMMLF-INST 2 (1992) (But most if not everyone involved in ANCSA failed to understand or minimized the cost of implementing ANCSA. In the 1980s when several corporations looked like they were going to fail the Native corporations were permitted to sell their accumulated financial losses, they were permitted even when no other corporation was allowed to sell NOLs anymore. These net operating losses, called "NOLS" were sold to profitable corporations for the value of the tax write off. In the four years of NOL sales generated more than 1 billion in capital and has been called the refunding of the Native corporations.).
[45] 43 U.S.C. §1605(c).
[46] 43 U.S.C. §1606(i).

In addition, the land conveyed to corporations was not originally subject to restrictions on voluntary alienation and the stock in both regional and village corporations was restricted from alienation only for 20 years.[47] ANCSA exempted corporations from a variety of security laws for the same 20-year period and gave tax exemption for Native lands and stock for the same 20 years.[48]

C. Did ANCSA Terminate Self-Government Powers?

ANCSA was a long and exhaustive statute, but despite its length, contained within it is no language that does away with the Alaska Natives' ability to self-govern.[49] This is important for two reasons. The first is that the canon of construction as to whether or not Congress has divested a tribe of inherent powers of self-government requires a clear expression of intent to abrogate the Tribes' powers. Silence on the issue is not a clear, unequivocal expression of Congress's intent to divest the Tribes of sovereignty. In fact, despite the extensive legislative hearings that were held, there was very little testimony or discussion of the Alaska Native Tribes' role in governance. The majority of the discussion focused on the value of the land and who was going to get what rights to the land.

The second reason that the silence in the statute regarding self-governance powers is important is because it supports the contention that the only issue ANCSA was resolving was land rights and it should not be read to be more than a resolution of property rights. Further support for reading ANCSA as only a resolution of property rights and not divestiture of the Alaska Native Tribes' inherent powers of self-governance is ANCSA's failure to include resolution as to Alaska Native Tribes' subsistence use of the land. Repeatedly the Alaska Native Tribes stated one of their foremost concerns they wanted addressed in ANCSA was preserving their ability to subsist only from the land.

As enacted in 1971, ANCSA extinguished subsistence claims seemingly without compensation. However, in the conference report accompanying ANCSA, Congress expressed a clear intent for the Secretary of the Interior and the State of Alaska to protect Alaska Native subsistence interests. The conference report stated that the committee,

[47] 43 U.S.C. §1606(h)1, §1607.
[48] 43 U.S.C. §1620.
[49] 43 U.S.C. §1601 et seq.

> "believes after careful consideration that all Native interest in subsistence resource land can and will be protected by the Secretary through exercise of his existing withdrawal duty…[The] Conference Committee expects both the Secretary and the state to take any action necessary to protect the subsistence needs of the Natives."[50]

This statement is nothing but a platitude without a mandate included in ANCSA.

The Secretary of the Interior and the State failed miserably in this protection. For the nine years immediately following ANCSA, neither the Secretary for the Interior nor the State withdrew any lands for subsistence use or established any sort of preference to limit access of others to the necessary resources needed by subsistence. This inaction led to the passing of Alaska National Interest Lands Conservation Act of 1980 (ANILCA).[51] ANCSA's failure to address subsistence rights means that ANCSA should be interpreted as only addressing compensation for land and not as a comprehensive statute that intended to terminate Alaska Native Tribes' inherent powers of self-government.

Finally, another reason ANCSA should be read narrowly and not as divesting Alaska Native Tribes' ability to self-govern is that it did not invalidate any other federal legislation that treated Alaska Native Tribes as possessing the ability to exercise self-governance, such as the Indian Reorganization Act.

III. Numerous Amendments to ANCSA Implicate Congressional Intent to Move Away From Assimilation and Support Long-Term Existence of Alaska Native Tribes Including Inherent Powers to Govern

The amended ANCSA demonstrates Congress's growing intent to support Alaska Native Tribes' inherent power to self-govern. These amendments show a congressional intention to follow the policy of self-determination and encouragement of Alaska Native Tribes' powers to self-govern.

In the original enactment of ANCSA the corporations were to receive the lands in fee, subject to voluntary alienation. In the case of

[50] H.R. Conf. Rep. No. 746, 1971 U.S.C.C.A.N. 2247, 2250.
[51] Discussion of ANILCA is beyond the scope of this paper.

lands that the Native corporations received and did not develop, the original provisions of ANCSA set a time limit of 20 years that they would be exempt from local real property taxes. Congress extended this time period three times culminating in an ultimate exemption in the Alaska Native Claims Settlement Act Amendments of 1987. The amendments changed the 20-year time limitation on exemption for these taxes and made the land indefinitely exempt from local real property taxes.

The original ANCSA also allowed for the alienation of the stock of the corporations after 20 years. The amendments made the stock of the Alaska Corporations inalienable unless a majority of the shareholders consent to alienation; no Native corporation has elected to make its stock alienable.[52] Without these provisions it is most likely that shortly after 1991 the corporations would devolve into non-Native ownership either through individual sales or hostile tender offers and takeover attempts.[53] Congress further ensured perpetual inclusion of Alaska Natives in the corporations by amending the requirement that only those Natives alive on the date of enacting could be shareholders without a transfer of a share. The act now allows for issuing new shares to newborn Alaska Natives if the majority of the shareholders consent.

Finally, ANCSA imposed no restriction on the land conveyed to Native Corporations created under ANCSA. But otherwise the lands were freely alienable – which means that the lands could be subject to creditor claims, liens, or taken to satisfy judgments. However, through congressional amendment ANCSA land is now exempt from adverse possession, real property taxes, judgment by bankruptcy, or other creditor claims and involuntary distributions.[54]

The amendments show that, whatever Congress's initial policy was, it now supports a policy of self-governance and self-determination. Congress gave the Alaska Native Tribes the ability to determine the composition of the corporations and the longevity of the corporations. The amendments allow for a perpetual relationship between the lands, the

[52] 43 U.S.C. §1606(h). *See also* Act of February 3, 1988 Pub. L. No. 100-241, § 5(h), 101 Stat 1788, 1792.
[53] One reason the amendments were enacted is in the early years very few of the corporations were successful and several-faced bankruptcy. The amendments of ANCSA were necessary in order to prevent a very real threat that the corporations would fail leaving the Alaska Natives in a far worse position.
[54] 43 U.S.C. §1636(d)(1)A. *See also* Act of February 3, 1988, Pub. L. No. 100-241, § 11, 101 Stat. 1788, 1806.

corporations received, and the Natives. Congress endorsed the power of self-determination and ability of the people themselves to choose how to define their relationship to the land.

IV. DID CONGRESS, POST-ANCSA, TERMINATE SELF-GOVERNANCE POWERS?

Congress has, post ANCSA, expressed an affirmation of Native Alaskan Tribes utilizing their inherent self-government powers. Continually it did this by both including Native Alaskans to the list of any legislation that would provide a benefit to Tribes not in the coterminous United States and by federally recognizing the Alaska Native Tribes.

The Indian Self-Determination and Education Assistance Act (ISDEA), enacted in 1975, is one of the most important laws responsible for changes in how Natives receive services.[55] It allows for Tribes to enter into contracts with the federal government to take control of federal programs and schools for Natives. The ISDEA affirms the governments "commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to individual Indian Tribes and to the Indian People as a whole."[56] This Act explicitly states that its purpose is to help bolster tribal self-government.[57] The ISDEA includes in its definition of Indian "including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act."[58]

The Indian Child Welfare Act (ICWA), enacted in 1978, gives jurisdiction over child custody determinations involving Native children and creates preferences for placing the child with a Native family. Its overriding purpose is to preserve and advance the integrity of Native families. Its function is to enhance tribal powers over the decision-making regarding those families.[59] Again, like in the Self Determination Act, the ICWA states that there is a "special relationship between the United States and the Indian Tribes and their members and the Federal responsibility to Indian

[55] COHEN, *supra* note 5, at § 22.02[2].
[56] 25 U.S.C. §450a(b).
[57] H. Rep. No. 103-653, 103d Cong., 2d Sess. 1 (1994). *See also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 22.02[3] (2005 ed.).
[58] 25 U.S.C. §450(b).
[59] COHEN, *supra* note 5, at § 11.01[1].

people."[60] Its purpose is to support the continued existence and integrity of Native Tribes.[61] Congress explicitly included a definition of Indian that "Indian" means any person who is a member of a Native tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in ANCSA.[62]

Although there are many other examples of where the federal government recognized that Alaska Natives possessed inherent powers of self-government, a particularly important example was Congress ratifying the Department of Interior's list of federally recognized Tribes. The list included 227 Alaska Tribes.[63] Prior to this Act it was hotly contested whether Alaska Natives were Tribes in the sense of Federal Indian law. The argument was that Alaska Natives were eligible for administering federally provided services, but not possessed with attributes of other Tribes, like sovereignty.[64] While there was controversy surrounding the inclusion of Alaska Natives on the list, ultimately Congress could have acted in either not affirming the list or removing them from the list.

The action by Congress of including Alaska Native Tribes in numerous congressional policies that state a goal of affirming and supporting Tribal self-governance and the formal recognition of Alaska Natives on the list of federally recognized Tribes show that currently Congress has no intention of abrogating the inherent powers of the Alaska Native Tribes.

A. Impact of Alaska v. Venetie on Alaska Native Tribes Self-Government Powers

In *Alaska v. Native Village of Venetie Tribal Government,* the Supreme Court ruled that the village tribal lands, which were ANCSA lands, were not "Indian Country" within the meaning of 18 USC §1151(b). Due to the lands not being "Indian Country" the Tribe lacked the power to impose a tax upon nonmembers doing business on the village lands.[65] Some have argued that the ruling in *Venetie* resulted in de facto

[60] 25 U.S.C. §1901.
[61] 25 U.S.C. §1901(3).
[62] 25 U.S.C. §1903.
[63] Pub. L. No. 103-454, 108 Stat. 4791 (Nov. 2, 1994), *codified at* 25 U.S.C. §479a, 479a-1 (2000).
[64] *See generally* Donald Craig Mitchell, *Alaska v. Native Village of Venetie,* 14 ALASKA L. REV. 353 (1997).
[65] Alaska v. Native Village of Venetie, 522 U.S. 520 (1998).

termination of Alaskan Tribes' sovereignty.[66] However, this is not the case; there are other forms of self-government that the Alaska Native Tribes can engage in with or without the ability to tax non-members on their land.

It might be possible to limit the holding of *Venetie* to the facts of the case. The Court, in its short opinion, did not discuss the Alaska Tribes' inherent sovereignty or whether the status of inherent powers were affected by ANCSA. The lack of discussion leaves the path open for future courts to consider if Alaska Native Tribes possess taxation among their inherent powers.

In addition, the court only considered the congressional intent of ANCSA as it was originally codified in the 1971 version and did not consider that the intent of ANCSA was drastically changed by subsequent amendments. Furthermore, *Venetie* most likely did not terminate sovereignty because the ruling would only apply to land in the exact situation as the village in question in the case. The court articulated two requirements for dependent Indian Country which would most likely cover other land in Alaska. The court required that (1) the land be set aside by the federal government for the tribe's use and (2) the land needed to be overseen by the federal government. While this definition could cover some ANCSA land, it does not cover all ANCSA land and therefore it cannot be said that *Venetie* is a de facto termination of Alaska Tribes' sovereignty.

*B. Alaska Supreme Court Affirmed Inherent Tribal Powers of Self-Governance Post-*Venetie

Alaska Native Tribes possession of inherent self-government powers was supported by the Alaska Supreme Court ruling in *John v. Baker.*[67] In this case an Alaska Native filed a custody petition in tribal court, seeking sole custody of his two children. The tribal court entered an order granting shared custody. The father then filed an identical suit in state superior court and the mother moved to dismiss the suit because the claim had been settled in tribal court. The superior court disagreed and granted custody to the father. Alaska's Supreme Court ruled that the ICWA did not apply and that Alaska Native Tribes had inherent, non-territorial sovereignty allowing it to resolve its domestic disputes between

[66] Benjamin W. Thompson, *De Facto Termination of Alaska Native Sovereignty*, AM. INDIAN L. REV., VOL 24 NO. 2, 421-454 (2000).
[67] John v. Baker, 982 P.2d 738 (Alaska 1999).

its own members and that ANCSA did not, by eliminating "Indian Country," divest the Alaska Tribes of their inherent sovereign powers.[68]

The strongest support of Alaska Native Tribes' self-government powers is their continual use of them, whether or not they are acknowledged by the State, the judicial system, or Congress. Throughout Alaska, the Alaska Native Tribes have been innovating ways to control and improve the well-being of their membership via increased oversight and administration of the local infrastructure, health, education, police and fire services, and employment in their communities.[69]

CONCLUSION

The federal government has never expressly divested the Alaska Native Tribes of their inherent self-government powers. It has, however, allowed them to be limited. Due to the formidable circumstances facing the Alaska Native Tribes in both lack of economic resources and poverty, and the growing body of evidence that the most effective way to handle these challenges is to allow the Natives themselves to exercise their own self-government powers, both the state government and the federal government should support their exercise of these powers.

It is the Tribes themselves that are managing and handling the conditions in their villages, and to under-cut their ability to effectively deal with the challenges they are facing by arguing that they do not possess self-government powers in the name of convenience, efficiency, and cohesive polity of Alaska as a whole is a disingenuous challenge at best. The state of Alaska should issue a formal policy of support of the Tribes to end the distraction of arguing over whether or not the Tribes possess inherent powers and focus instead on working with the Alaska Native Tribes to solve the many challenges they are facing.

[68] *Id.*
[69] *See generally* Stephen Cornell and Joseph P. Kalt, *Alaska Native Self-Government and Service Delivery: What Works, Joint Occasional Papers on Native Affairs*, No. 2003-01 (2003) *available at* http://udallcenter.org/jopna.net/ (last visited Apr. 20, 2013).